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In The

Supreme Court of the United States

HARLEY A. GRICE, Trustee of the Harley A. Grice Revocable Trust, and HARLEY A. GRICE, WENDY G. BUTLER, and PENNY E. CURLER, Trustees of the Marilyn M. Grice Revocable Trust,

Petitioners,

v.

VERMONT ELECTRIC POWER COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment to the United States Constitution requires that a public purpose be found and compensation be paid for the physical intrusion of a fiber optic cable onto land where the intrusion is perceptible, though inconspicuous, from the ground.

LIST OF PARTIES

Petitioners are Harley A. Grice, as Trustee of the Harley A. Grice Revocable Trust, and Harley A. Grice, Wendy G. Butler, and Penny E. Curler, as Trustees of the Marilyn M. Grice Revocable Trust. Respondent is the Vermont Electric Power Company, Inc. ("VELCO"), a Vermont corporation engaged in the wholesale transmission of electricity. Harley A. Grice, Wendy G. Butler, Penny E. Curler, and Heather A. Grice were also named individually in the proceedings below as beneficiaries under the two named trusts. Also participating as a statutory party in the proceedings below (Vermont Supreme Court Docket No. 06-510 only) was the Vermont Department of Public Service. The Meach Cove Real Estate Trust participated at the Vermont Supreme Court level as an *amicus curiae*, supporting Petitioners.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, subsidiary, or affiliate of corporations that have done so.

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OPINIONS AND ORDERS BELOW

The opinion of the Vermont Supreme Court dated May 16, 2008 is reported as *Grice v. Vermont Electric Power Company, Inc.*, 2008 VT 64, ___ A.2d ___, and is reproduced in the appendix at 1a-27a. This decision results from the consolidation of two matters in the Vermont Supreme Court: (1) *In Re Petition of Vermont Electric Power Company, Inc.* (Docket No. 06-510), a condemnation action on appeal from the Vermont Public Service Board ("PSB"), reproduced in the appendix at 28a-163a; and (2) *Grice v. Vermont Electric Power Company, Inc.* (Docket No. 06-352), which is an appeal of an unreported Vermont Superior Court decision, reproduced in the appendix at 164a-171a. Only the first matter, involving the scope of allowable condemnation and the compensation required therefor, is relevant to this petition.

After the appeals in No. 06-510 (the condemnation matter) were docketed in the Vermont Supreme Court, Respondent Vermont Electric Power Company, Inc. ("VELCO") requested that the Vermont Supreme Court remand the matter to the Public Service Board so that the PSB could clarify its ruling. VELCO specifically requested clarification of the PSB's order that VELCO could not condemn and install a larger fiber optic cable than it needed to service its own electrical transmission lines. The Vermont Supreme Court issued an order of limited remand to the PSB, which is reproduced in the appendix at 172a. The Vermont Public Service Board's unreported decision on the request for clarification was entered

on January 19, 2007 and is reprinted in the appendix at 173a-183a. Subsequently, oral argument was had in the Vermont Supreme Court on November 28, 2007, and the Court issued its opinion in the consolidated cases on May 16, 2008.

JURISDICTION

The Vermont Supreme Court's decision affirming the Public Service Board's condemnation order, but amending the PSB's order to allow respondent to install larger fiber optic cables (Docket 06-510), and affirming the Superior Court's decision in consolidated Docket 06-352, was entered on May 16, 2008. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: " . . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

STATEMENT OF THE CASE

This matter raises a simple issue for this Court's consideration: Whether, in the context of a utility condemnation, the installation of a larger fiber optic

cable than is necessary to provide service to the public constitutes an additional taking, requiring a finding of public purpose and additional just compensation under the Fifth Amendment. The evidence of record showed that a smaller cable would have served the public purpose needed by the new electrical transmission lines Vermont Electric Power Company ("VELCO") was installing and, accordingly, the Vermont Public Service Board ("PSB") denied VELCO the right to install a larger cable with additional fiber optic "strands." The larger cable is of greater diameter, and, more importantly for VELCO, would provide it with excess capacity to trade or sell for revenue. The Vermont Supreme Court, in reversing the PSB on this issue, held that (at a distance of 60 feet or more from the ground) the larger dimension was "nearly imperceptible to the naked eye" and thus "does not take any more property" than the smaller cable. App. 26a. The Vermont court's decision flies in the face of a long line of precedent from this Court finding any physical intrusion on land to be a taking. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Moreover, the Court disregards the fact that no public necessity had been shown for the additional, larger taking.

Petitioners[1] are the owners of farmland in the pastoral setting of Middlebury, Vermont. The parcel at issue in this matter encompasses some 319 acres and serves as a residence for Harley Grice and other members of the Grice family. The land contains some woodlands, but a majority is put to productive use as cow pasture and hayfield. The utility lines at the center of this controversy consist of new, 345kV electrical transmission lines on towers approximately 90 feet high and traversing nearly a mile of the Grice's property, dominating the once-lovely view. There are 12 towers on the Grice's land, each holding three primary high-tension wires, and two grounding cables set above the transmission lines. One of these grounding cables is referred to as an Optical Ground Wire ("OPGW") and contains the fiber optic strands for the transmission of data by light. Fiber optic lines have enormous capacity for the transmission of data and would serve, as an initial purpose, for VELCO's own needs in maintaining and monitoring the electric lines. This use was not disputed.

The evidence before the Vermont PSB showed that a 24-strand OPGW would have been more than sufficient to serve VELCO's own needs in monitoring

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[1] The Petitioners, co-owners of the tract of land involved, are Harley A. Grice, as Trustee of the Harley A. Grice Revocable Trust, and Harley A. Grice, Wendy Butler, and Penny Curler, Trustees of the Marilyn M. Grice Revocable Trust. For ease of reference, they will be referred to as the Grices or the Grice Family.

and maintaining its lines. The Grices did not challenge VELCO's right to install this size cable as part of its condemnation for the new 345kV transmission lines. App. 66a. The Grices did challenge VELCO's proposal to install a larger, 72-strand cable. The 72-strand fiber optic cable sought by VELCO is 1/16 of an inch greater in diameter than the 24-strand cable. Over the course of its mile-long trip across the Grice's property, the additional physical intrusion is equivalent to a four-foot by eight-foot billboard. App. 185a.

The Vermont PSB found that this additional capacity was not necessary to the electricity transmission project, and disallowed the larger cable. App. 70a; 156a-159a. The Vermont Supreme Court, on appeal, viewed the additional physical presence of the larger cable as "de minimis" and "incidental" to the primary purpose of the condemnation. App. 27a. Based on this reasoning, the Vermont court decided that installing the broader wire did not take any of Petitioners' property, and did not even require a finding of public need. Despite briefing by the parties, App. 184a-189a, the Vermont Supreme Court neglected to address the issue of whether VELCO's line expansion violated the Takings Clause of the United States Constitution.

A. Background and Procedural History

In 2004 VELCO initiated a plan to increase the capacity of the electrical grid in Vermont by installing along a 35-mile corridor a 345kV electrical line as

part of what it dubbed the "Northwest Reliability Project" or "NRP." Under Vermont law, a utility must petition the Vermont Public Service Board for a Certificate of Public Good ("CPG") before embarking on such a major project. *See* 30 V.S.A. § 248(a). VELCO petitioned the PSB for a Certificate of Public Good and, after lengthy hearings, the PSB issued a CPG, concluding that the project should go forward to enhance the reliability of the electrical system in Vermont. *See* Final Order of Vermont Public Service Board, No. 6860 (Jan. 28, 2005), *available at* http://www.state.vt.us/psb/6860fnl012805.pdf.

The project generated considerable controversy, and a number of parties challenged the PSB's decision to grant a CPG. Under Vermont law, final decisions of the PSB are heard on direct appeal to the Vermont Supreme Court. On appeal, the Vermont Supreme Court affirmed the Public Service Board's decision to grant a Certificate of Public Good. *In Re Vermont Electric Power Company*, 179 Vt. 370, 895 A.2d 226 (2006).

During this timeframe, VELCO attempted to negotiate with landowners along the proposed corridor to obtain necessary easements. VELCO already held a 150-foot wide easement across the Petitioners' land, over which runs an existing smaller electrical transmission line. In September 2005, after VELCO and the Grice family failed to reach an agreement on an easement for a larger swath, VELCO petitioned the Public Service Board under Vermont utility condemnation law, *see* 30 V.S.A. § 110 *et seq.*, to

condemn an additional 100-foot wide strip of the Grice property. The easement sought would be almost a mile in length, running parallel to VELCO's existing easement for the lower voltage lines. The condemnation proposal included a plan to install OPGW cable across the easement with 72 optical fiber strands to transmit data, video, and voice communication. Although some data transmission capability was found necessary to ensure the reliability of the electric line, VELCO conceded in the condemnation proceeding that it did not need this much capacity. App. 158a-159a. VELCO acknowledged that it would trade, sell or lease space on the lines as a means of raising corporate revenue. App. 156a.

Under Vermont utility condemnation procedure, a petition is first heard by a hearing officer and then reviewed by the Public Service Board. Vt. Public Service Board Rule 2.215(c), *available at* http://www.state.vt.us/psb/rules/OfficialAdoptedRules/2000_Rules_of_Practice.pdf. In this case, the hearing officer granted VELCO's request for condemnation and ruled on a number of peripheral issues not germane here, including the removal of trees and access to the easement area. The hearing officer denied VELCO's request to install the larger cable, concluding that since the excess fiber optic capacity was not necessary for VELCO's primary business of providing long-distance electrical services, VELCO did not have

authority to condemn the property for such a purpose. App. 72a.[2]

On review, the Public Service Board adopted the hearing officer's findings in an extensive decision, reproduced *in toto* at App. 28a-163a. The PSB's order addresses all the issues between the parties, including the compensation to be assessed to the Grices for condemnation of the new mile-long by 100-foot wide easement. App. 83a, 141a-142a. The PSB adopted the hearing officer's conclusion that granting VELCO an easement for electrical transmission was necessary, but denied VELCO's request to install a 72-strand fiber optic cable. In accordance with the hearing officer's factual findings, the Board concluded that the excess capacity was not necessary to the project. App. 156a-157a. Without a finding of necessity, VELCO had no authority to condemn. *See* 30 V.S.A. §110 (prefacing the eminent domain power with a requirement of necessity); *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 148, 375 A.2d 975, 980 (1977) (describing the finding of necessity required). Since the PSB denied VELCO's request to install the larger cable, it assessed no compensation to the Grices for the additional property that the 72-strand cable would occupy.

Both parties appealed the PSB's decision to the Vermont Supreme Court. *See* 30 V.S.A. § 124. Because

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[2] The Public Service Board hearing officer's Findings and Conclusions are incorporated into the PSB's order at 29a-123a.

the Grices' appeal was filed first, they were dubbed the "appellants" under Vermont procedural law and filed the first briefs. The Grices argued in the Vermont Supreme Court, among other things, that VELCO did not have authority to condemn for this line at all, as the Vermont utility condemnation statutes did not apply to a project subject to Federal energy regulatory law.[3]

On cross-appeal, VELCO argued that it should have been allowed to install the larger fiber optic cable with excess capacity because (1) it was authorized under Vermont law to buy, sell, and trade such excess capacity; and (2) such use would be incidental to the primary easement taken for the electrical transmission lines, and thus no further burden on the Grices as underlying landowners. The Grices argued in response to VELCO's cross-appeal that (a) VELCO was not authorized by statute to condemn for this purpose; (b) there had been no finding of necessity for the excess fiber optic capacity by the PSB; and (c)

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[3] The Grices raised a number of other issues in the Vermont Supreme Court that are not germane to this Petition. They separately appealed the amount of the condemnation award to superior court under 30 V.S.A. § 112(3), which provides for a jury trial on the damages awarded, but not on the scope or necessity of the taking. This matter was stayed pending decision of the Vermont Supreme Court. Since the Vermont Supreme Court has now found the larger fiber optic cable did "not take any more property" than the smaller cable, App. 26a, the Grices are unable to seek compensation for the additional property taken by the installation of the larger cable.

such use would constitute an additional uncompensated physical intrusion onto the Grices' property, and thus an unconstitutional taking in violation of United States and Vermont constitutional law. App. 184a-189a.

During the pendency of the appeal, VELCO filed a motion with the Vermont Supreme Court seeking a limited remand to the PSB to allow the PSB to clarify its ruling with regard to the issue of excess fiber optic capacity. On January 9, 2007, the Vermont Supreme Court granted this motion, giving the PSB sixty days to issue a clarifying order. App. 172a. In its subsequent order, the PSB clarified its ruling concerning the larger fiber optic cable, again holding that VELCO was not authorized to install the larger cable – even if it did not intend to sell, lease, or trade the excess capacity – because VELCO only needed the smaller 24-strand cable to ensure the reliability of the electrical transmission lines. App. 181a ("Because VELCO still seeks to condemn property rights beyond those which are necessary for it to render adequate service to the public in the conduct of its business, we, once again, reject VELCO's request.").

B. The Vermont Supreme Court Opinion

The Vermont Supreme Court affirmed most of the PSB's order. It ruled against the Grices on the issues in their direct appeal, finding, among other things, that condemnation was proper under Vermont statutes despite regulation of the project under

federal energy law. App. 9a-12a. The Grices do not seek review of that portion of the Vermont Supreme Court's decision in this Court.

On the cross-appeal, the Vermont Supreme Court also ruled in VELCO's favor. It adopted the PSB's factual findings, but concluded nonetheless that the larger cable was "nearly imperceptible" and "does not take any more property" than the smaller cable. App. 26a. The court explained that the "incidental" commercial benefit that would accrue to VELCO through the excess capacity of the larger fiber optic line did not derogate from the general public purpose of the taking for electrical transmission. *Id.* To reach this result, the Vermont court essentially forgot that the case before it was a condemnation case – where compensation must be paid and public necessity must be shown – and instead it treated the matter as if it were deciding the scope of an existing easement under common law. The Vermont Supreme Court ignored Petitioners' arguments that such additional taking – without a finding of public need or additional compensation – would be a violation of the Fifth Amendment and related Vermont constitutional principles. App. 23a-27a. It is this aspect of the Vermont court's opinion from which review is sought in this Court.

REASONS FOR GRANTING THE WRIT

The decision below ignores well-settled precedent from this Court. Indeed, the Vermont court sidestepped two of the most fundamental tenets of this Court's eminent domain jurisprudence: First, a physical intrusion onto land, no matter how small, constitutes a taking; and second, there must be a finding of public purpose or necessity for any taking by eminent domain.

The case is significant, and review by this Court appropriate, because the Vermont court's decision directly contradicts the holdings of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and is in tension with the decisions of at least five circuit courts of appeal. *See, e.g.*, *Cable Invs., Inc. v. Woolley*, 867 F.2d 151, 159-60 (3d Cir. 1989); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1174-75 (4th Cir. 1993); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1993); *Cable Arizona Corporation v. Coxcom, Inc.*, 261 F.3d 871, 876 (9th Cir. 2001); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999).

In addition, at a time when there is both confusion and consternation as to the direction of takings jurisprudence, *see* Part II, *infra*, the Vermont court has essentially re-written takings law by defining a small taking as not a taking at all. This Court's

decision in *Kelo v. City of New London,* 545 U.S. 469 (2005), has been widely – if perhaps misguidedly – portrayed as a "watering down" of the public purpose prerequisite to a taking; but the Vermont court's opinion eviscerates the requirement entirely. According to the decision below, even a physical intrusion onto land can be considered "incidental" – that is, not a taking at all – and thus requires no finding of public necessity and no additional compensation.

I. A Taking Is a Taking, No Matter How Small

The Vermont court's decision that a "de minimis" taking is no taking at all flies in the face of the well-settled precedent of this Court. In case after case this Court has held that a physical intrusion on land, no matter how small, constitutes a taking of property requiring just compensation. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) ("[W]here government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the Clause.");

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (finding the government's imposition of a navigational servitude to be a taking because it "will result in an actual physical invasion of the privately owned marina").

> [C]ourts . . . *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted) (cited by *Loretto*, 458 U.S. at 427 n.5).

The most significant precedent in this area remains *Loretto*. There, the Plaintiff objected to the attachment to her building of a cable ½ inch wide and 36 feet long, suspended in the air about 18 inches above a roof by taps 4 inches square, and joined by two metal boxes. The total space occupied by this installation – approximately 1½ cubic feet – was about the size of a breadbox. *Loretto*, 458 U.S. at 422,

438 n.16. The Plaintiff did not even notice the wires until two years after she had purchased the property. *Id.* at 443 n.2 (Blackmun, J., dissenting). The *Loretto* installation thus occupied a small fraction of the additional area appropriated by the larger OPGW cable on the Grice family's property in this case. Despite the "insignificance" of the area affected in *Loretto*, *see id.* at 447 (Blackmun, J., dissenting), this Court ruled that the plaintiff's property had been taken, and that such a physical taking represented "perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435.

Loretto flatly rejected the concept that there could be an "incidental" or "de minimis" physical intrusion. "Constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. The Court canvassed prior precedent regarding similar installations, and concluded that such cases "clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430 (citing *Lovett v. West Va. Central Gas Co.*, 65 S.E. 196 (W. Va. 1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo. App. 1965); and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)).

Physical takings occupy a special place in Fifth Amendment jurisprudence "because of the unique burden they impose: A permanent physical invasion however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). The right to exclude lies at the heart of the property rights protected by the Fifth Amendment. It is one of the most important components of the "bundle of rights" protected by the Constitution. *See* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1836 (2006); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing the power to exclude as "one of the most essential sticks in the bundle").

Loretto affirmed the significance of the property owner's right to exclude even when the challenged intrusion might actually increase property values, and the property owner could not put that portion of her building to productive use. *Loretto*, 458 U.S. at 437 n.15, 452; *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169 (1998) ("We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value."). Here, by contrast, adding to the thickness of the line bifurcating the Grices' fields further detracts from the property's once lovely view, *and* increases the industrial load of the taken land, which can only adversely affect the property's value. Moreover, the

stretch of property taken by VELCO *is being* developed for value, as VELCO has acknowledged that it would trade the excess fiber optic capacity provided by the larger OPGW cable to obtain capacity in other locations, and would sell or lease excess capacity for additional revenue. *See* Strahilevitz, *supra*, at 1843.[4] The property owner's space has been invaded, and accordingly, just compensation must issue.

Despite this, the Vermont Supreme Court found no taking, in essence adopting the "de minimis" standard advocated by the dissent in *Loretto*, 458 U.S. at 453 n.10, and rejected by the Court's majority. App. 27a (ruling that the additional 48 fibers are "de minimis" and of "incidental benefit" to the line's primary purpose). The Vermont court assumed that, since "[i]nstalling seventy-two fibers in the OPGW increases the diameter of the OPGW by a dimension nearly imperceptible to the naked eye," that the cable must "not take any more property from the Grices than the OPGW with twenty-four fibers." *Id.* at 26a. Apart from the logical inconsistency of this statement

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[4] The sale and/or leasing of fiber optic capacity can have tremendous commercial value, as cellular telephone carriers, cable television companies, and internet service providers (ISPs) are generally in the market for such capacity. Market conditions will vary by region and corridor, but the value of the additional fiber capacity can be significant. *See* Wayne C. Lusvardi & Charles B. Warren, *What Price an Easement? Setting Market Value in Fiber Optic Corridors*, Fortnightly Magazine, Public Utility Reports, July 1, 2001, *available at* http://www.pur.com/pubs/3787.cfm.

(a width expansion perceptible – if only barely – to the naked eye from 60 feet below, extending for nearly a mile, undeniably takes additional property), the conclusion fails to pass constitutional muster, for size does not matter to the question of whether a physical occupation constitutes a taking.

> [A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.

United States v. Causby, 328 U.S. 256, 265 n.10 (1946), quoting *Butler v. Frontier Telephone Co.*, 79 N.E. 716, 718 (N.Y. 1906).

Nor does the fact that the Grice's field had previously – though in a different location – been appropriated for energy transmission diminish the importance of applying the takings analysis to the additional burden imposed here. The fact that the owner of a property has permitted (or rights have been condemned for) one use does not waive the owner's right to exclude other uses. Cases from the

circuit courts of appeal have consistently found that utility and cable companies may not "piggyback" their lines to existing easements, since "the fact property was taken for a public use to begin with does not mean that it may be taken again for another public use without the payment of just compensation to its owner." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1329 (11th Cir. 1999).

For example, the Third, Fourth, Eighth, Ninth, and Eleventh Circuits have construed § 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2) (allowing cable franchisees to install their lines "over public rights-of-way, and through easements, . . . which have been dedicated for compatible uses"), not to allow cable companies to install their lines on easements privately granted to other utilities, partly for fear that a broader construction "would gravely implicate the Takings Clause." *Cable Arizona Corporation v. Coxcom, Inc.*, 261 F.3d 871, 876 (9th Cir. 2001); *see also Cable Invs., Inc. v. Woolley*, 867 F.2d 151, 159-60 (3d Cir. 1989); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1174-75 (4th Cir. 1993); *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1993); *Cable Holdings of Georgia v. McNeil Real Estate*, 953 F.2d 600, 608-09 (11th Cir. 1992), *cert. denied*, 506 U.S. 862 (1992). The Eleventh Circuit also held that the mandatory access provision of the 1996 amendment to the Pole Attachment Act, requiring a utility to permit other companies' cable installations on its own poles, effects a

taking. *Gulf Power Co.*, 187 F.3d at 1329 ("Such a permanent, physical occupation of property falls squarely within the *Loretto* rule.").

State courts have reached similar conclusions. *See Buhl v. US Sprint Communications Co.*, 1991 WL 16250, *6 (Tenn. Ct. App. 1991) (holding that installation of fiber optics cables across railroad rights of way, even if de minimis, constitutes "a taking by way of burdening the existing easement for which the fee owners are entitled to compensation"); *GTE Northwest, Inc. v. Public Utility Com'n of Oregon*, 900 P.2d 495, 503 (Ore. 1995) (finding that collocation rules requiring installation of telecommunication equipment on other companies' premises "under *Loretto*, constitutes a physical invasion"); *Gerstein v. Axtell*, 960 P.2d 599, 601 (Alaska 1998) (holding that the Cable Act would constitute a taking if construed to authorize cable companies to install their lines across easements privately granted to other utilities by the landowners).

II. Even a Small Taking Requires a Showing of Public Purpose or Necessity

As this Court has consistently held, the Fifth Amendment's "public use" prong requires a finding that any taking satisfies some public purpose or

necessity.[5] *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

Under Vermont law, the Public Service Board is charged by statute with the administration of utility condemnation. 30 V.S.A. §§ 203, 110-11. It is the PSB that determines whether a sufficient public need will be met by a project, and it is the PSB that determines, in the first instance, the just compensation to be paid. 30 V.S.A. § 112.

The PSB found that there was no public need for VELCO to install the larger OPGW cable containing the excess fiber optic strands. App. 156a-157a. Indeed, VELCO conceded at hearing before the PSB that the additional fiber optic capacity was not necessary. App. 158a-159a. As such, the PSB prohibited VELCO from installing the larger cable and clarified its ruling on the limited remand.[6] *Id.* at 159a, 176a-181a.

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[5] The Fifth Amendment is of course applicable to state action by its incorporation into the Fourteenth Amendment. *Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005).

[6] The PSB's order of December 5, 2006 clearly prohibited VELCO from selling, leasing or trading any additional capacity from fiber optic cables laid across the Grice's land. VELCO requested a remand for clarification because it believed that the PSB's order was ambiguous as to whether VELCO could *install* the larger cable, even if it did not use it, sell it, or trade it. Petitioners found no ambiguity in the PSB's decision, which the PSB confirmed in its subsequent order dated January 19, 2007.

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The Vermont Supreme Court did not question the PSB's findings: "[W]e do not disagree with the Board's finding that the excess lines are not *necessary* for VELCO's maintenance of its electrical grid. . . ." App. 25a (emphasis in original). Rather, in an extraordinary holding, the court found that even though the larger cable was not "*necessary*" for a public use, it was merely "incidental" to the smaller cable and thus a finding of public use or necessity was, in a word, unnecessary. *Id.*

This ruling stands this Court's taking jurisprudence on its head, transferring valuable physical and economic rights from private landowners to a private utility corporation, without so much as a finding of public need.[7] This Court should grant review to prevent the state court's evisceration of the public use requirement.

This Court's ruling in *Kelo* prompted a firestorm of popular criticism, as pundits, state legislators, and

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App. 176a-181a. Since there was no necessity shown for the larger cable, the PSB prohibited VELCO from installing it. *Id.*

[7] The states' delegation of its condemnation authority to utility companies can only be justified by the public purpose served by the utility and the extensive regulation imposed upon the utility. *See, e.g., Auclair v. Vermont Electric Power Co., Inc.*, 133 Vt. 22, 24-25, 329 A.2d 641, 643 (1974). Here, not only does the excess capacity serve no public purpose, App. 25a, 156a-157a, but the valuable economic rights to the use of excess fiber capacity would go wholly unregulated. VELCO could lease, sell or trade these for additional corporate revenue, without regulatory oversight.

the public quaked under Justice O'Connor's admonition that the opinion served "effectively to delete the words 'for public use' from the Takings Clause," rendering property vulnerable to seizure from one private citizen for the benefit of another. *Kelo v. City of New London*, 545 U.S. 469, 494 (2005).[8] Yet, although many feared that *Kelo* "lowered the bar" on what must be shown for a public purpose,[9] in fact,

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[8] *See* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum. L. Rev. 883, 893 (2007) ("The case caused a public outcry. Many people worried that the Court's ruling cast all property rights into doubt. Anyone's home could be taken, people feared, if the government said it could be put to more productive use in another's hands.") (citations removed); *see also* Scott Bullock, *The Specter of Condemnation*, Wall St. J., June 24, 2006, at A11 (characterizing *Kelo* as "the most universally despised Supreme Court decision in decades," prompting "a nearly unprecedented, grass-roots backlash against eminent domain abuse . . . "); Dan Haar, *Plan Expertly Before Grabbing*, Hartford Courant, July 31, 2005, at D1 (calling the case "a touchstone for a nationwide uprising against 'eminent domain abuse' "); Judy Coleman, *The Powers of a Few, the Anger of the Many*, Wash. Post, Oct. 9, 2005, at B2 ("[T]he result was a firestorm of public resentment that cut across party and ideological lines."); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L. Rev. 1849, 1880 n.142 (2007) ("As of November, 2006, thirty-four States have enacted some kind of reform restricting the exercise of eminent domain in response to the decision in *Kelo*. This includes ten States that have adopted reforms by popular referendum. . . . Altogether, more than one hundred bills have been introduced at the state legislative level in the wake of *Kelo* to restrict the use of eminent domain for economic development.").

[9] *See, e.g.*, Brett Talley, *Restraining Eminent Domain Through Just Compensation: Kelo v. City of New London*, 29 Harv. J.L. & Pub. Pol'y 759, 762 (2006) ("Given the Court's great

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this Court has never steered away from the core requirement that a substantial public purpose must be shown before *any* property right can be condemned. *See id.* at 477-78 (acknowledging that governments may not employ condemnation for the benefit of private parties, merely upon the pretext of a public purpose); *id.* at 490-91 (Kennedy, J., concurring) (emphasizing that reviewing courts maintain an obligation to assess whether such improper motive is evident).

The Vermont PSB understood this. Finding no public necessity, it upheld the hearing officer's denial of VELCO's request to use the larger cable:

> The "primary" versus "incidental" distinction is irrelevant. In using the power of condemnation, a company such as VELCO can

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deference to legislative determinations of public use, this ruling effectively declared all development plans legitimate, irrespective of how those plans are enacted"); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol'y 491, 496 (2006) (describing *Kelo* and its precedents as "extremely troubling," and agreeing with Justice O'Connor that "all private property is now vulnerable to being taken and transferred to another private owner"); Orlando E. Delogu, *Kelo v. City of New London – Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 Me. L. Rev. 17, 34 (2006) ("the analytic approach utilized by the *Kelo* majority (and Justice Kennedy) is unprecedented and puts not only private property rights, but many other constitutionally protected rights, at risk").

> install sufficient telecommunications infrastructure to enable it to provide adequate service. It cannot use this authority to install excess infrastructure that, in essence, is designated to help VELCO make money or avoid paying for telecommunications services elsewhere on its system that VELCO could otherwise purchase.

App. 71a, 156a-159a; *see also* 176a-181a (reaffirming this decision after remand). The Vermont Supreme Court, in contrast, believed that a finding of public use was unnecessary. If a use, even a physical intrusion onto land, is "incidental" or "de minimis," not only is no compensation paid, but public use need not be shown. App. 25a.[10]

Unfortunately, the Vermont Supreme Court has not been alone in misinterpreting this Court's holdings. For example, the Federal Circuit misconstrued this Court's jurisprudence extending back to *Berman v. Parker*, 348 U.S. 26 (1954), by similarly refusing to

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[10] Viewing the additional presence of the larger cable as "incidental" confuses the issue. This is an original condemnation proceeding, in which VELCO has taken, and will pay for, the property occupied by its new electrical transmission lines, including the smaller, 24-strand fiber optic cable. The dispute here is whether VELCO may take additional property from the Grices that is not needed for the energy project providing the basis for the condemnation. It is as if the federal government planned a new federal building near the Capitol, but instead of condemning only the two townhouses whose lots are needed for the new building, it condemned the whole block, so that it could lease space to a private grocery store on the unneeded land.

inquire into the public purpose of an overbuilt fiber optic cable in *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132 (Fed. Cir. 2004). There – unlike in the instant case – the size of the larger capacity cable was not an issue, as there was no evidence that the cable occupied additional physical space. The issue in *Tuthill* was merely the installation of extra, saleable fiber capacity beyond the scope of the original granted easement. Over a strenuous dissent by Chief Judge Mayer, the court rejected its obligation to examine the public purpose of the additional capacity, holding that if the cable took up the same amount of space, the inquiry must end. *Id.* at 1138-39. Judge Mayer countered that the purpose of the extra capacity was critical. If the project violated the terms of the original grant, then the government's use of the cable constituted a taking, since it physically occupied the plaintiff's property while acting beyond the original easement's scope. *Id.* at 1139-40 (Mayer, C.J., dissenting).

Tuthill exemplifies an orientation toward takings jurisprudence similar to that of the Vermont Supreme Court here. Both cases are notable for their misapprehension of the law and troubling in their potential. *Kelo* stands for the proposition that reviewing courts should not second-guess whether legislative planning decisions are public enough. *Kelo*, 545 U.S. at 487-88. *Tuthill*, by contrast, refused to examine whether a public purpose exists at all. The Vermont Supreme Court has strayed even further from this Court's holdings. Its decision allows VELCO to expand the

physical area taken in an original condemnation proceeding for purposes that the court itself acknowledged were *not* necessary to the project. App. 25a.

Such decisions fundamentally misinterpret the directive of *Kelo* and its predecessors. Through them, these courts – and those trial level courts obliged to follow their lead – have abandoned the judicial branch's historic role as part of the essential system of checks and balances that protects citizens from abuse by government. Such decisions also help stoke the fear and consternation which arose – much of it misguided – from *Kelo*. *See, e.g.*, Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 Sup. Ct. Rev. 103, 104-05 (2005) (describing the "conflagration of outrage" sparked by *Kelo* and warning that "the legacy of *Kelo* could be inadequate or even counterproductive protections of property rights"); David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. Envtl. L. & Pol'y 195, 196 (2006) (describing the fear that "the 'public use' stipulation for the use of eminent domain no longer had any meaning and that the Court was now prepared to endorse any taking for any reason. . . ."); Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N.Y. Times, October 5, 2005, at C9 (observing that "[f]ew recent Supreme Court opinions have aroused as much public outrage as *Kelo*. . . . Critics on both the 'eft and the right politically have said that the *Kelo* decision potentially endangers every home and business."); Keith Aoki,

et al., *Trading Spaces: Measure 37, Macpherson v. Department of Administrative Services, and Transferable Development Rights as a Path Out of Deadlock*, 20 J. Envtl. L. & Litig. 273, 283 (2005) ("The national outrage over *Kelo* has been fueled by continuing uncertainty and confusion over the basic principles of regulatory and takings law discussed above. Until land-use jurisprudence provides a principled limit on the government's power to invade property rights, land-use regulations will continue to be viewed with deep suspicion by property-rights advocates as arbitrary and unprincipled burdens.").

This Court should seize this opportunity to make clear in this area of emerging technology that the core principles of takings jurisprudence have not changed. The public use prong of the Fifth Amendment has not been laid to rest, and the commentators were wrong to assume that *Kelo* was its death knell. It was improper for the Federal Circuit in *Tuthill*, and the Vermont Supreme Court here to assume that no inquiry was necessary into whether a public purpose must be shown. *Berman*, *Midkiff*, and *Kelo* did not relieve public bodies from finding a public use or necessity. A public purpose must be shown, and compensation must be paid, whenever there is a physical intrusion onto land.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully submitted,

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Grice v. Vermont Electric Power Company, Inc. (2006-352 & 2006-510)

2008 VT 64

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NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

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Nos. 2006-352 & 2006-510

Harley Grice, Individually and as Trustee of the Harley Grice Trust, Wendy Butler, Penny Curler and Heather Grice	Supreme Court
v.	On Appeal from Addison Superior Court
Vermont Electric Power Company, Inc.	
In re Petition of Vermont Electric Power Company, Inc.	On Appeal from Public Service Board

November Term, 2007

Matthew I. Katz, J. (06-352)

David C. Coen and John D. Burke, Board Members (06-510)

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David L. Grayck and Evan J. Mulholland of Cheney, Brock & Saudek, P.C., Montpelier, for Amicus Curiae The Meach Cove Real Estate Trust (06-510).

PRESENT: Reiber, C.J., Skoglund and Burgess, JJ., and Gibson J. (Ret.), and Eaton, D.J., Specially Assigned

¶ 1. **REIBER, C.J.** These two related appeals involve a petition by the Vermont Electric Power Company (VELCO) to condemn an easement for an electrical-transmission line across the property of landowners, Harley Grice, individually and as Trustee of the Harley Grice Trust, Wendy Butler, Penny Curler and Heather Grice (the Grices). The Public Service Board granted VELCO's petition to condemn a strip of the Grice property, but denied VELCO's

request to install excess fiber-optic capacity along the corridor. Concurrent to the Board proceedings, the Grices filed a declaratory action in superior court challenging the Board's statutory and constitutional authority to condemn their property. The court concluded that the Board had constitutional and statutory authority. The Grices appeal both the Board's condemnation order and the superior court's judgment. VELCO cross-appeals from the Board's order denying its request to add excess fiber-optic capacity to its transmission line. We affirm the superior court decision and the Board's condemnation order, but amend the Board's order to allow VELCO to install the requested fiber-optic capacity.

¶ 2. The procedural history and facts of the case are briefly as follows. VELCO initiated a plan to increase the capacity of the electrical grid in Vermont by installing along a thirty-five-mile corridor a 345 kilovolt (kV) electrical line as part of the Northwest Reliability Project (NRP). VELCO petitioned the Board for a certificate of public good (CPG) and in January 2005, the Board concluded that the NRP was necessary for the reliability of the electrical system in Vermont and issued a CPG. See 30 V.S.A. § 248(a) (requiring an electric company to obtain approval from the Board that a project "will promote the general good" before beginning to construct a new transmission facility). Several parties challenged the Board's decision to grant a CPG, and, on appeal, this Court affirmed. *In re Vt. Elec. Power Co.*, 2006 VT 69, 179 Vt. 370, 895 A.2d 226.

¶ 3. Following the Board's issuance of the CPG, VELCO attempted to negotiate with the landowners along the proposed corridor, including the Grices, to obtain the necessary easements. VELCO already has a 150-foot-wide easement across the Grices' land where an 115kV electric line is installed. In September 2005, after VELCO failed to reach an agreement with the Grices, VELCO petitioned the Board to condemn a 100-foot-wide strip of the Grice property, about a mile in length that would run parallel to the existing lower-voltage easement. VELCO asked for permission to remove so-called "danger trees" outside of the easement and for access to the easement at all points in the case of an emergency. As part of its proposal, VELCO also planned to install an optical ground wire (OPGW) cable across the easement with seventy-two optical fibers to transmit data, and video and voice communication. VELCO explained that the OPGW cable would be used for internal communication and was necessary to insure reliability of the line, but acknowledged that it did not need all seventy-two fibers for internal communication. VELCO planned to trade any excess capacity to other communication service providers in return for use of their capacity in other parts of the state where VELCO does not have optical fibers and must pay for their use.

¶ 4. The hearing officer granted VELCO's request for condemnation, and for unlimited access to the easement. The officer concluded that it was necessary for VELCO to be able to reach the easement to

remove trees or restore power in the case of an emergency. The hearing officer denied VELCO's request to install excess capacity in the OPGW, concluding that this was not necessary for VELCO's business of providing electrical services, and therefore VELCO could not condemn the property for such a purpose:

¶ 5. On appeal, the Board adopted the hearing officer's findings, affirmed the hearing officer's conclusion that the easement was necessary, and granted VELCO condemnation of the easement. The Board also granted VELCO unlimited access to the easement, concluding that it was necessary to maintain reliability of the line in emergency situations. The Board assessed damages for the Grices at $25,000. In response to VELCO's request to install excess capacity in the OPGW, the Board concluded that VELCO was not authorized to sell, lease or exchange excess capacity. In a subsequent order clarifying this conclusion, the Board specified that VELCO was not authorized to install all seventy-two fibers because VELCO only needed twenty-four fibers to insure the reliability of the line. The Board reasoned that if VELCO could buy capacity from other providers in other parts of the state then it was not necessary to have excess capacity to trade.

¶ 6. While the Board action was pending, the Grices also filed an action for declaratory judgment in Addison Superior Court, challenging VELCO's statutory and constitutional authority to condemn their land in a proceeding before the Board. The Grices argued that the Board's assertion of jurisdiction violated its

authorizing statute, was preempted by federal law and violated the Vermont Constitution because the energy running through the transmission lines would be regulated by federal, not state, law. The superior court dismissed the complaint, concluding that the condemnation action did not violate any statute or the Vermont Constitution, and was not preempted by federal law. The Grices appealed. The Grices also appealed the Board's decision, challenging the Board's authority to adjudicate the condemnation action. VELCO filed a cross-appeal, arguing that the Board erred in not granting it the right to install excess fiber-optic capacity along the easement. We consolidated the appeals from the Board and the superior court.

¶ 7. We review de novo the superior court's decision interpreting the statute and the Vermont Constitution. *Wright v. Bradley*, 2006 VT 100, ¶ 6, 180 Vt. 383, 910 A.2d 893. Our review of decisions from the Board is more deferential; we defer to the Board's "expertise and informed judgment," and "apply a strong presumption of validity" to its orders. *In re Verizon New England Inc.*, 173 Vt. 327, 334, 795 A.2d 1196, 1202 (2002). "Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its particular area of expertise." *Id.* at 334-35, 795 A.2d at 1202. With these standards in mind, we turn to the issues on appeal.

I.

¶ 8. We first address the Grices' claims in their direct appeal. In three related claims, the Grices argue that the Board had no authority to grant VELCO's condemnation request because the condemnation action: (1) is contrary to the Board's statutory mandate, (2) is preempted by federal law, and (3) violates Article 2 of the Vermont Constitution. The Grices also contend that if the Board did have authority to adjudicate the condemnation action, the Board erroneously granted VELCO overly broad access to the property. Finally, the Grices request attorney's fees and expert witness costs. We consider these claims in turn.

A.

¶ 9. The Grices' main argument on appeal is that the resulting 345kV line will be regulated by federal law, not state law, and it is beyond the Board's authority to condemn property for a use that it will not regulate. In particular, the Grices argue that the Board does not have statutory authority to grant condemnation unless the Board will directly regulate the resulting use. In assessing the Grices' claim, we begin by examining the language of the Board's authorizing statute. See *In re Verizon New England*, 173 Vt. at 335, 795 A.2d at 1202 (explaining that to give effect to the Legislature's intent, we first examine the plain meaning of the statute). The statute authorizes the Board to adjudicate condemnation of

private land when it is "necessary" for a public service corporation under the jurisdiction of the Board to acquire such property or an easement to the property "that it may render adequate service to the public in the conduct of its business." 30 V.S.A. § 110. Once a utility initiates a condemnation action, the Board may grant the request if the Board finds that it is

> necessary in order that the [utility] may render adequate service to the public in the conduct of the business which it is authorized to conduct, and in conducting which it will, according to the laws of this state, be under an obligation to serve the public on reasonable terms, and pursuant to the regulations of the board.

Id. § 112.

¶ 10. The Board made the required necessity determinations in this case. First, the Board generally concluded that the NRP is in the public interest and necessary for the reliability of the electrical system in Vermont when it granted VELCO a CPG for the project. *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 21 (affirming Board's decision to grant a CPG); see *Auclair v. Vt. Elec. Power Co.*, 133 Vt. 22, 26, 329 A.2d 641, 644 (1974) (explaining that issuance of a CPG is "a resolution" that the project is in the public interest). In addition, as related to the Grice property, the Board determined that an easement across the Grices' land is necessary for VELCO to complete the new line and provide adequate service to the public. See *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 18

(explaining that § 248 certification is a planning and policy determination and does not predetermine the necessity of condemning particular parcels of land).

¶ 11. On appeal, the Grices do not challenge the Board's necessity determinations; rather, the Grices' arguments rest on the language in the latter part of § 112 that requires a petitioning company's business to be "according to the laws of this state, [and] be under an obligation to serve the public on reasonable terms, and pursuant to the regulations of the board." 30 V.S.A. § 112. The Grices interpret this requirement as authorizing the Board to adjudicate condemnation proceedings only in cases where the energy passing through the lines will be directly regulated by the Board. VELCO is an electrical-transmission company that transports power from other states into Vermont and sells it wholesale to the retail companies who in turn sell the power to individual consumers. Because VELCO's lines are part of an interconnected interstate grid, the power moving through them is regulated by federal law. The Grices reason that because the power from the new transmission line will not be regulated directly by the Board, but by federal regulations, the Board does not have authority to condemn their property.

¶ 12. We conclude that the Board properly exercised its authority to conduct condemnation proceedings in this case. The Board interpreted the statute's directive that a condemning company's business must be conducted "pursuant to the regulations of the board," 30 V.S.A. § 112, as follows: "The most reasonable

construction of this requirement is not that the Board has actually adopted regulations that apply to a particular company, rather that the company, by law, is subject to such regulations as the Board may adopt." We agree with the Board's analysis, especially given our deference to the Board's interpretation of statutes within its area of expertise. See *In re Verizon New England*, 173 Vt. at 334-35, 795 A.2d at 1202 (deferring to the Board's interpretation of statutes within its area of expertise absent compelling indication of error). The statute does not require that the energy in the transmission lines be regulated by the Board, but that VELCO be subject to the Board's control and obligated to serve the public interest. An examination of the relevant statutes indicates that both of these elements are met. VELCO is a public service corporation, obligated to serve the public and subject to the Board's oversight. See, e.g., 30 V.S.A. §§ 102 (establishing process for a company to become a public service corporation and providing that the Board can revoke the status for good cause), 209 (granting the Board jurisdiction over "all matters respecting" the business of a public service corporation). Moreover, the Board is empowered by statute to take action to insure the reliability of VELCO's transmission lines if it is in the interest of the people of Vermont. *Id.* §§ 210 (granting the Board jurisdiction to order electric companies to build or connect transmission lines if it is in the public good), 213 (empowering the Board to order an electrical-transmission company to transport electric energy over its transmission lines "at a reasonable service

charge" and "in such manner as the board shall direct"). Thus, "in the conduct of [its] business," VELCO is "under an obligation to serve the public," and is subject to the Board's control. *Id.* § 112.

¶ 13. The Grices' assertion that the statute is satisfied only if the Board directly regulates the energy passing through the lines is an overly narrow interpretation and at odds with the overall "reason and spirit" of the law. *Wright*, 2006 VT 100, ¶ 7 (quotation omitted) (explaining that in cases where the statute's plain meaning is not readily apparent, we examine the entire statute and look to the overall purpose of the law). The purpose of the statute is to insure that land is condemned for public use and remains subject to public control. In this case, there was previously a determination that construction of the new line is necessary for the public good, *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 4, and, as indicated above, VELCO is obligated to serve the public pursuant to the Board's control. We find no merit in the Grices' proposition that VELCO's new transmission line will not benefit Vermonters because the line may carry electricity to other states. Even if the new transmission line carries electricity to other states at times of excess capacity over existing demand, the opposite is also true. The same transmission system of interconnected interstate lines will necessarily bring electricity to Vermonters at times of need, and in an emergency, the Board can require VELCO to do so. See 30 V.S.A. § 213.

¶ 14. Furthermore, the Grices' interpretation of the statutory language is at odds with the overall statutory scheme. Under the Grices' interpretation of the statute, the Board can entertain condemnation actions only if it then actively regulates every aspect of the resulting use. If this is true, then at no time would the Board have jurisdiction to adjudicate condemnation actions for the wholesale transmission of energy because, as discussed below, this energy is regulated by federal law. The statute, however, envisions transmission companies, as well as energy retailers, using the power of eminent domain for the construction of transmission lines to the benefit of the public. See *id.* § 2802. As the Board explained, if transmission companies condemn property, "§ 2802 requires these companies to sell and furnish electricity to the extent that the Board determines that this would be required by 'the public convenience or necessity.'" We agree with the Board's interpretation of the statute and conclude that the statute authorizes condemnation in this case.

¶ 15. Next, we consider whether federal law preempts the Board's authority to adjudicate this condemnation action. Federal law can preempt state law pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2. *In re Vt. Ry.*, 171 Vt. 496, 499-500, 769 A.2d 648, 652 (2000). State law may be preempted either explicitly by the language of a federal statute or implicitly by the federal statute's structure and purpose. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (9th Cir. 2004); *In re Verizon New*

England, 173 Vt. at 336, 795 A.2d at 1203. A federal law implicitly preempts state law either by field preemption – if the legislation demonstrates Congress' intent to occupy an entire field, or through conflict preemption – where Congress has not entirely displaced state regulation in a particular field, but state law actually conflicts with federal law. *Dynegy*, 375 F.3d at 849; see *In re Verizon New England*, 173 Vt. at 336, 795 A.2d at 1203 (listing different types of preemption). Where the issue is not whether the federal government had authority to act, but whether state action conflicts with and has been displaced by federal law, there is a presumption that the power of the state is not superseded. *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 17-18 (2002). "The party seeking to overcome this presumption bears a heavy burden." *In re Vt. Ry.*, 171 Vt. at 499, 769 A.2d at 652.

¶ 16. The Grices argue both forms of implicit preemption and first submit that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction in the area of electrical transmissions and thus federal law preempts state authority in the entire field. The Grices claim that FERC's jurisdiction over interstate wholesale electric transmission is "plenary" and "exclusive." See *Dynegy*, 375 F.3d at 849-51. The opposite, however, is true because federal law regulating energy transmission does not occupy the entire field of energy regulation. As the Supreme Court of the United States concluded, FERC's authorizing statute and its own regulations have preserved

state jurisdiction in several key areas pertaining to energy transmission. *New York*, 535 U.S. at 24. The Court recognized "Congress' intent to preserve state jurisdiction over local facilities." *Id.* at 22. Thus, we conclude that federal law has not wholly displaced state authority in the regulation of transmission of electrical energy, and examine whether any federal law conflicts with, and thus preempts, state regulation over VELCO's transmission lines.

¶ 17. The Grices also argue that FERC regulations requiring open access of transmission lines conflict with and therefore preempt state law. In 1996, FERC promulgated Order No. 888 entitled, "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities." 61 Fed. Reg. 21,540 (May 10, 1996). The rule mandates that all public utilities, which own, control or operate facilities used for transmitting electric energy in interstate commerce, must file open-access nondiscriminatory transmission tariffs. VELCO is a provider of electricity transmission and pursuant to these regulations, has already filed a tariff with FERC. Because FERC regulates the terms and conditions of the sale and transmission of wholesale energy in the 345kV line, the Grices argue that federal law preempts state control of VELCO's transmission.

¶ 18. The Board concluded that, notwithstanding federal control over rates for the sale of interstate-transmission services, open access to the VELCO

transmission system and the reliability of interstate-transmission service, these elements of specific control did not conflict with the Board's responsibility under Vermont law to control electrical facility siting. We agree. Electricity in almost the entire continental United States is integrated in a grid system. Thus, no individual electrical provider or transmitter can guarantee that the electricity produced in its plant or transmitted across its lines will be directed to a particular consumer or group of consumers or be limited for distribution to a discrete geographic area. *New York*, 535 U.S. at 31-32 (Thomas, J., dissenting and concurring). While we acknowledge federal authority to govern this interstate electrical-transmission grid, we conclude that Order No. 888 does not conflict with, but preserves, state jurisdiction over the power to exercise eminent domain to site transmission lines. FERC Order No. 888 states that it does not affect state authority "over local service issues, including reliability of local service." 61 Fed. Reg. at 21,626 n.544. The rule further explains that "Congress left to the States authority to regulate generation and transmission siting." *Id.* at 21,626 n.543. The electricity that moves across state lines is regulated by the federal government, but the transmission lines and their supporting structures remain in Vermont and are subject to state control. See 30 V.S.A. § 2 (granting the Department of Public Service supervision over "[s]iting of electric generation and transmission facilities"). There is no conflict between VELCO's obligation under its FERC tariff to provide nondiscriminatory access for the free-flowing

transmission of electricity across its transmission lines and the Board's authority to approve the necessity and siting of those lines. Thus, we conclude that federal law does not preempt the Board's exercise of jurisdiction in this case.

¶ 19. In a related argument, the Grices claim that condemnation of their land violates their rights under the Vermont Constitution. The Grices rely on *Tyler v. Beacher*, 44 Vt. 648 (1871), wherein a mill owner sought to build and operate a grist mill on Island Pond, and filed a condemnation action to flood his neighbors' properties for this purpose. On appeal, this Court held that the mill owner could not use eminent domain to take his neighbors' land because the mill was purely for his personal benefit and because he was not required to serve the public through its operation. *Id.* at 655-56. The Grices analogize *Tyler* to their case and ask us to similarly hold that VELCO may not condemn their land because the resulting transmission line will not be subject to state regulation.

¶ 20. We conclude that the Board did not violate the Vermont Constitution in granting VELCO condemnation of the Grice property for construction of the 345kV line. The Constitution allows appropriation of private land when necessary for public use. Vt. Const. ch. I, art. 2. As explained in *Tyler*, to fit this standard the use must benefit the public and be subject to some state control. We do not read *Tyler* as requiring the public use to be specifically regulated by state

enactment in every aspect of its operation to permit exercise of the power of eminent domain.

¶ 21. This interpretation is consistent with our previous statements defining public use. Following *Tyler*, we explained that public use "appears from the character of the business, and it is safely guarded for the obligation to serve all on equal and reasonable terms, facilities, and accommodations." *Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 86 Vt. 45, 54, 83 A. 332, 335 (1912). Unlike the grist mill in *Tyler*, whose owner had no obligation to serve the public, VELCO is a public-service company authorized to provide energy transmission for the benefit of the public and VELCO has an obligation under its charter to serve the public interest. "[A] corporation which engages in the business of generating and distributing electric energy for general sale for power purposes devotes its property to a public purpose as much as if it limited its business to the sale of current for lighting purposes." *Id.* at 56, 83 A. at 336.

¶ 22. The Grices argue that VELCO's transmission services do not directly benefit individual Vermonters and do not benefit all citizens, and that therefore the transmission is not a public use. In defining a public use, we have explained: "It is not necessary to a public use that the whole public, or any considerable portion of it, participate in it. The use may be, and frequently is, limited to a small locality, and yet be public in a constitutional sense." *Deerfield River Co. v. Wilmington Power & Paper Co.*, 83 Vt. 548, 553, 77 A. 862, 864 (1910). The electrical power in the state

passes through VELCO's transmission lines. Although VELCO does not retail this power directly to consumers, no electricity could reach Vermonters without passing through VELCO's transmission lines. Thus, we conclude that condemnation of the Grice land is for a public use and does not contravene the Vermont Constitution.

B.

¶ 23. We next address the Grices' contention that the Board's order is flawed because it does not particularly describe the routes VELCO is authorized to use to access the easement. According to the Grices, their entire 319-acre farm is burdened in perpetuity without a proper finding of necessity and without payment of compensation because VELCO has the right to access the easement strip at any location. The Grices request that the order be remanded for the Board to describe, condemn and order compensation for specific access routes to the easement. We conclude that the Board adequately described VELCO's rights to access the easement to remove trees and to respond to emergencies.

¶ 24. In a petition for condemnation, a public utility corporation must "describ[e] the property or right" it wishes to condemn. 30 V.S.A. § 111(a). Generally, the interest in land, including the principal right-of-way in the case of an easement, "must be described with certainty and accuracy." *Vt. Elec. Power Co. v. Anderson*, 121 Vt. 72, 78, 147 A.2d 875, 879 (1959). The

secondary right-of-access, however, may be "set forth in less precise terms." *Id.* at 78, 147 A.2d at 880. The right-of-access need not be expressly defined or limited because "[t]he creation of an easement or right of way for an electric power line carries with it a reasonable right of access to enable the utility to discharge its legal obligation to render adequate and dependable service." *Id.*

¶ 25. VELCO's proposed easement included a clause granting VELCO the right to enter the Grices' property to cut or trim trees outside the easement area if those trees interfered with the easement area. The proposed easement also granted VELCO the right to enter and cross the Grice property to access the easement without permission in the event of an emergency, but specified that VELCO was responsible for any damage caused by such intrusion. The Grices complained that these clauses were overly broad and instead sought to identify specific access points to the easement. The Board rejected the use of specific access points as impracticable. The Board concluded that the right to enter and cross the Grice property is "critical to all of VELCO's maintenance activities, including structure maintenance, pole testing, tree trimming, brush control, line inspection, and any other work requiring VELCO to access the right of way." The Board found that it was necessary for VELCO to access the land without the landowner's permission to "maintain the reliability and safety of the line."

¶ 26. The Board's finding of necessity is not clearly erroneous. See *In re Vt. Elec. Power Co., Inc.*, 131 Vt. 427, 432, 306 A.2d 687, 690 (1973) ("Only when we have reviewed the entire record and have been left with the definite and firm conviction that a mistake has been committed will we hold a finding to be clearly erroneous."). In addition, VELCO's petition adequately described the easement it sought and that the Board did not err in declining to demarcate specific access routes to the easement. As explained in *Anderson*, access routes to an easement need not be described in precise detail. 121 Vt. at 78, 147 A.2d at 880. Here, the clauses strike an appropriate balance between providing VELCO with the broad access that the Board found was necessary, and also protecting the Grices by stipulating that the access will be used only in emergencies and that VELCO will compensate the Grices for any damage caused by this access.

¶ 27. Finally, we are not persuaded by the Grices' contention that VELCO must, as part of the condemnation proceeding, identify and compensate them for any land that will be used as an access route or any tree that will be removed. In support, the Grices cite *Arkansas Power & Light Co. v. Potlatch Forest, Inc.*, wherein the Arkansas Supreme Court held that an electric company had to specifically describe and condemn trees endangering transmission lines and the access routes to the easement. 707 S.W.2d 317, 320 (Ark. 1986). We find this case unconvincing because we apply a different law pertaining to secondary

easements than in Arkansas. As described in *Anderson*, we rely on the principle that secondary easements need not be described with particularity – a concept that the court in *Arkansas Power & Light Co.* specifically rejected.

C.

¶ 28. Finally, we address the Grices' request for attorney's fees and expert-witness costs. The Grices claim they are entitled to attorney's fees because the condemnation action contravenes their constitutional protection that "every person ought to obtain right and justice, freely, and without being obliged to purchase it." Vt. Const. ch. I, art. 4.* According to the Grices, VELCO's litigation compelled them to "purchase" justice because they had to defend against the condemnation proceeding. The Grices also argue that equity requires an award. We conclude that there is no basis either in law or in equity to award the Grices attorney's fees or expert-witness costs in this case.

¶ 29. We adhere to the American rule that each party is responsible for its own attorney's fees absent an agreement or a statute authorizing a fee award. *Monahan v. GMAC Mortgage Corp.*, 2005 VT 110, ¶ 76, 179 Vt. 167, 893 A.2d 298. In this case, no statute provides for an award of attorney's fees to the Grices. Although the trial court has discretion under its powers of equity to award attorney's fees, such deviation from the general rule is only justified in exceptional cases. *Id.* ¶¶ 75-76. Equity does not

demand an award in this case; there is no evidence that VELCO acted in bad faith to prolong the litigation or forced the Grices to defend multiple actions. See *In re Gadhue*, 149 Vt. 322, 328-30, 544 A.2d 1151, 1154-55 (1987) (granting fees where the plaintiff was forced through defendant's acts to undergo a second round of litigation).

¶ 30. Similarly, there is no constitutional basis to award fees. The right to justice secured by Article 4 is violated if a party is precluded from seeking review of a decision in court. *In re Stoddard*, 144 Vt. 6, 8, 470 A.2d 1185, 1186 (1983). Here, the Grices had full access to the legal system and were not denied access to justice. The Board did not abuse its discretion in declining to award the Grices attorney's fees.

II.

¶ 31. VELCO's cross-appeal concerns whether it has authority to install excess fiber-optic capacity along the easement. The Board concluded that VELCO needed only twenty-four fiber-optic wires to insure the reliability of the new 345kV line and prohibited VELCO from installing any excess fibers or from trading excess capacity. VELCO argues that the additional fibers are collectively so small that they will not additionally burden the Grices' land and therefore are not a taking. In the alternative, VELCO submits that a seventy-two-wire fiber-optic line is reasonably necessary for the reliable operation of the electrical-transmission system in the state and

should be allowed. We conclude that the seventy-two-wire fiber-optic line may be installed as incidental to and consistent with the primary use of providing a reliable electrical-transmission network.

¶ 32. In its condemnation petition, VELCO sought an easement that would allow it to install excess fiber-optic capacity along the 345kV corridor. The Board denied VELCO's request, explaining that VELCO could not use its condemnation authority to take the Grices' property for the purpose of installing telecommunications capacity beyond that necessary for VELCO to provide adequate service. VELCO also argued that the excess capacity was necessary because it would be used to trade and obtain the use of fiber-optic lines in areas of the state where VELCO does not have any capacity and this use was necessary for the maintenance of those other lines. In response, the Board concluded that VELCO could simply purchase lease rights from those companies and therefore trading was not necessary. In its clarification decision, the Board unambiguously concluded that VELCO was authorized to install only twenty-four of the requested seventy-two fibers and could not trade any excess capacity.

¶ 33. We conclude that the Board's interpretation of the statute's requirements is overly strict. The Board's interpretation essentially requires VELCO to demonstrate that every aspect of its plan meets the public necessity and use requirements specific to the improvements implemented at the precise location of

the condemned property. We are not persuaded that the statute or the Constitution require this result.

¶ 34. As explained above, the Vermont Constitution limits the appropriation of private land to those instances where the property will be used for a public purpose. This does not mean, however, that the condemning authority must demonstrate how each detail of the project is necessary to serve the public use when those uses are incidental to the public project. Under our public-utility condemnation law, the power to condemn is not invalidated even if an incidental nonpublic purpose may also result from the taking, as long as the substantial and primary purpose remains intact and the incidental benefit "is a mere sequence" of the action. *Lucia v. Vill. of Montpelier*, 60 Vt. 537, 545, 15 A. 321, 325 (1888). In *Lucia*, Montpelier sought to condemn private property to run an additional water-supply line from Berlin Pond. The additional water exceeded the residents' specific water needs, but Montpelier explained that it required the additional capacity in the case of a fire emergency or in case the primary water main failed. The town did not dispute that in the absence of such an emergency, the excess water would be used for a different purpose – to create power that could be sold. On review, this Court concluded that Montpelier had authority to condemn property to transport the additional water based on the primary purpose of perfecting the town's water supply, and any incidental benefit did not invalidate this action. *Id.*

¶ 35. In this case, we similarly conclude that VELCO's primary purpose of installing the OPGW is a public use because it is necessary for maintenance of the line, and the incidental benefit of having excess capacity to lease or trade does not invalidate the public use. Although we do not disagree with the Board's finding that the excess lines are not *necessary* for VELCO's maintenance of its electrical grid because the capacity in other parts of the state could be purchased, there is also no evidence to contradict VELCO's assertion that its purpose in acquiring the excess capacity is to trade for capacity in other areas where VELCO does not have fiber-optic wires. As VELCO explains, the communications capacity it derives will be used to further its public purpose of providing reliable electrical service throughout the state. This incidental benefit derives from and does not interfere with the public use of the line. Thus, the benefit VELCO will accrue from this increased capacity is incidental to and consistent with the line's primary purpose of providing increased capacity and reliability to the electrical-transmission network in the state.

¶ 36. We caution that the doctrine of incidental benefit as it applies to these facts is not a blanket authorization for a condemning authority under our public-utility law to use its power of eminent domain to improperly serve private interests. The benefit is not incidental if the power of eminent domain is "perverted to wrongful ends or diverted to wrongful uses." *Id.*; see *Courchesne v. Town of Weathersfield*,

2003 VT 62, ¶ 12, 175 Vt. 585, 830 A.2d 118 (mem.) (explaining that if a town's action is primarily to serve a public purpose, an incidental private gain does not invalidate the public purpose). The only additional benefit accruing in this case is to the condemnor, VELCO, and is incidental to its statutory authority to condemn land when "necessary" to provide "adequate service to the public in the conduct of its business." 30 V.S.A. § 110. Furthermore, while it is true, as the Grices argue, that no more property may be condemned "than would be necessary to accomplish purely the public component of the project," *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 966 P.2d 1252, 1258 (Wash. 1998), we disagree that VELCO is taking more than it would need to accomplish its legitimate propose [sic]. As the Board found, VELCO must install an OPGW in the corridor to maintain the safety and reliability of the network. The only question is whether VELCO can install twenty-four or seventy-two fibers within the wire. Installing seventy-two fibers in the OPGW increases the diameter of the OPGW by a dimension nearly imperceptible to the naked eye, and does not take any more property from the Grices than the OPGW with twenty-four fibers. The increased capacity and ability to trade excess capacity generated from the seventy-two fibers does not expand the taking and imposes no additional burden to the easement and therefore is allowed as an incidental benefit to the public good served as the primary purpose of the condemnation action.

¶ 37. Having concluded that the seventy-two fiber-optic wire is de minimis and may be installed as incidental to the primary purpose of the condemnation action, we do not address VELCO's additional arguments supporting its installation.

The superior court's judgment is affirmed; the Public Service Board's condemnation order is affirmed, but the order is amended to allow VELCO to install seventy-two fiber-optic wires and to trade excess capacity.

FOR THE COURT:

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Chief Justice

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* The Grices also cite Articles 7 and 9 of the Vermont Constitution, but do not explain how these provisions entitle them to attorney's fees; therefore, we do not address these arguments. See *Craven v. McCrillis*, 2005 VT 22, ¶ 8, 178 Vt. 476, 868 A.2d 740 (mem.) (declining to address issues that are inadequately briefed).

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7121

Amended Petition of Vermont Electric Power Company, Inc. for authority to condemn easement rights in property interests of The Harley A. Grice Revocable Trust, Harley A. Grice, Trustee; Wendy G. Butler, Penny E. Curler, Successor Trustees; and Harley A. Grice, Wendy G. Butler, Penney [sic] E. Curler and Heather H. Grice, as Beneficiaries; and the Marilyn M. Grice Revocable Trust, Wendy G. Butler, Penny E. Curler, and Harley A. Grice, Trustees; and Harley A. Grice, Wendy G. Butler, Penny E. Curler, and Heather H. Grice, as Beneficiaries, located in Middlebury, Vermont, for the purpose of constructing the 345 kV transmission line portion of the so-called Northwest Reliability Project	Hearings at Montpelier, Vermont August 28-29, 2006 September 6, 2006

Order entered: 12/5/2006

PRESENT: David C. Farnsworth, Esq.,
Hearing Officer

APPEARANCES: James Dumont, Esq.
For Harley A. Grice, Trustee of the Harley A. Grice Revocable Trust; and Marilyn M. Grice, Trustee of the Marilyn M. Grice Revocable Trust ("Grices")

Kimberly Hayden, Esq.
Downs Rachlin Martin PLLC
For Vermont Electric Power Company, Inc.

Gary Karnedy, Esq.
Primmer Piper Eggleston & Cramer, PC
For Vermont Electric Power Company, Inc.

James Porter, Esq.
For Vermont Department of Public Service

I. INTRODUCTION

In this proceeding, Vermont Electric Power Company, Inc. ("VELCO") seeks to condemn part of a property owned by Harley A. Grice, Trustee of the Harley A. Grice Revocable Trust, and Marilyn M. Grice, Trustee of the Marilyn M. Grice Revocable Trust ("Grices") for purposes of an easement. In this Proposal for Decision, I conclude that the requested condemnation, with some modifications, is necessary

to allow VELCO[1] to render adequate service to the public in the conduct of VELCO's business. I also conclude that this condemnation will not interfere with the orderly development of the region and scenic preservation. Therefore, I recommend that the Vermont Public Service Board ("Board") authorize, as conditioned here, the condemnation of part of the property owned by the Grices for a power line easement.

I also conclude that the value for the Grices' property as of January 20, 2006, is $800,000, and that the value of the Grices' property immediately after the easement expansion would be $775,000. I, therefore, recommend that the Board authorize the payment of $25,000 as just compensation for the taking of this property.

II. BACKGROUND

On September 23, 2005, VELCO filed a petition with the Board pursuant to 30 V.S.A. §§ 110-124, seeking to condemn a portion of certain property owned by Harley A. Grice, Trustee of the Harley A. Grice Revocable Trust, and Marilyn M. Grice, Trustee

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[1] On August 17, 2006, VELCO and Vermont Transco LLC ("Vermont Transco") filed a petition with the Board requesting that the Board join Vermont Transco as co-petitioner, jointly and severally, with VELCO. Below at pages 46-50, I discuss this issue and recommend that the Board grant the joinder petition. However, for purposes of clarity, in the remainder of this Proposal for Decision I refer to only VELCO as the petitioner.

of the Marilyn M. Grice Revocable Trust ("Grices") in Middlebury, Vermont, for the purpose of constructing a 345 kV transmission line. The transmission line is part of the so-called Northwest Reliability Project ("NRP") for which VELCO received a Certificate of Public Good ("CPG") in Docket 6860 on January 28, 2005. The proposed easement is approximately 5,148 feet long, and would expand the width of an existing easement on the Grice property by 100 feet.[2]

I conducted a prehearing conference at the Middlebury Town Offices in Middlebury, Vermont, and a site visit with counsel for all the parties on February 13, 2006. I also held technical hearings for three days in Montpelier, Vermont, on August 28, 2006, August 29, 2006, and September 6, 2006.

III. The Statutory Standard

The statutory standard for condemnation is found at 30 V.S.A. Section 112, and reads, in pertinent part, as follows:

> When the board finds:
>
> (2) That the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public in the conduct of the business which it is authorized to conduct, and in conducting which it will, according to the laws of this

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[2] Lind pf. direct at 3.

state, be under an obligation to serve the public on reasonable terms, and pursuant to the regulations of the board;

(A) That the condemnation of the property or right will not unduly interfere with the orderly development of the region and scenic preservation.

(3) That the condemnation of such property or right is sought in order that the petitioner may render adequate service to the public in the conduct of such business, it shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment. That compensation shall be based upon the value of the property on the day the petition is presented to the board,[3] and shall include as separate elements the value of the property taken, impairment to the value of remaining property or rights of the owner, and consequential damages including but not

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[3] VELCO filed its petition on September 23, 2005. VELCO and the Grices presented valuations dated January 19, 2006, and January 20, 2006, respectively. No party objected to the dates of the evaluations being different than the date of the petition, there is nothing in the record to suggest that the difference of four months is material to the valuation of the Grices' property, and therefore, I have relied on the valuations that the parties submitted.

limited to the damage to the owner's business.[4]

The findings and discussion below address these statutory requirements.

IV. FINDINGS AND DISCUSSION

Based on the evidence of record and the testimony presented at hearing, I hereby report the following findings to the Board in accordance with 30 V.S.A. § 8.

A. Necessity

Reliability and Increased Demand

1. The condemnation of the Grices' property, as provided for in this Order, is necessary in order for VELCO to render adequate service to the public. See Findings 2-61, below.

2. VELCO, whose business offices are located in Rutland, Vermont, is a company engaged in the transmission of electricity. VELCO Petition for Condemnation, September 23, 2005, at 1.

3. The NRP, in total, provides a series of transmission system infrastructure improvements that address reliability needs throughout VELCO's system. In 2005, the Board found:

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[4] 30 V.S.A. § 112.

> If nothing is done to correct the existing reliability problems, by the time the Vermont summer peak reaches 1,100 MW (forecast for between 2006 and 2009), loss of the West Rutland to Middlebury 115 kV (K-30) line or the Granite to Barre 115 kV (K-26W) line would be a contingency that could result in voltage collapse. The K-30 line contingency, the worse of the two, could cause voltage collapse at loads as low as 1,050 MW if nothing is done to improve the existing system. With further load growth, the list of critical contingencies increases.

Docket 6860, Order of January 28, 2005, at Finding 42.

4. Also in 2005, the Board found:

> The 1,100 MW load level is the load level by which all elements of the proposed Project (except the expansion of the Granite dynamic reactive device from +/- 75 to +/- 150 MVARs) are needed in service to ensure that the power system both meets applicable planning standards and is able to reliably serve the region's growing loads.

Id. at Finding 64; LaForest pf. at 3

5. Vermont is susceptible to significant loss of load at critical outages on the system followed by the loss of a transmission element. Many of the limiting outages would likely result in the loss of significant numbers of customers in the State of Vermont, and

potentially customers in New York and New Hampshire as well. LaForest pf. at 3.

6. On August 1 and 2 of 2006, Vermont experienced peak power load levels in excess of 1100 MW. The peak demand occurred on August 2, with an hourly peak load level calculated to be 1118 MW. This peak load demand is a new all-time high for the State of Vermont, exceeding the previous all-time high (1086 MW) established on December 20, 2004. Vermont approached its previous all-time summer peak earlier this summer, on July 17, 2006, with a state peak load of 1076 MW. *Id.*

The Proposed Route and Alternatives

7. The proposed 345 kV transmission line (or "proposed project," or "easement expansion") is an integral part of the NRP. Litkovitz pf. at 2.

8. Based on recent peak loads just experienced by Vermont, the West Rutland-New Haven 345 kV line and the remaining unconstructed NRP facilities are now necessary for VELCO to provide adequate service to the public. *Id.* at 4; Litkovitz pf. at 2.

9. VELCO designed the route to be condemned across the Grices' parcel for the 345 kV line to meet engineering, reliability, and safety requirements and to minimize the number of pole structures along the right-of-way. Lind pf. at 6.

10. There is an existing 115 kV transmission line across the Grice property, and the proposed route

across the Grices' property follows the existing 115 kV line, but would require a wider corridor. Litkovitz pf. at 3; Lind pf. at 3.

11. The NRP is required to meet the need for present and future demand for services which could not otherwise be provided for in a more cost effective manner through energy conservation programs and energy-efficiency and load management measures. Litkovitz pf. at 2.

12. VELCO filed a proposed final design for the 345 kV line with the Board on July 29, 2005, which includes the proposed line that would run across the Grices' property. Lind pf. at 5.

13. VELCO must obtain the right to cross the Grice property in order to complete construction of the 345 kV portion of the NRP. *Id.*

14. VELCO has been unable to acquire the property rights without condemnation because, after multiple communications between VELCO and the Grices, the parties were not able to reach an agreement for VELCO to otherwise acquire the rights. Lind pf. at 5, 23.

15. An alternative to VELCO's proposal, the use of underground cable for portions of the proposed West Rutland to New Haven 345 kV line, would have a significant potential to adversely affect system stability and reliability. Litkovitz pf. at 2.

16. The Board has also found that "the extensive installation of underground cable for higher

voltage (345 kV) transmission lines introduces new operating and reliability concerns, including issues related to capacitance and harmonics that are difficult to resolve." Docket 6860, Order of January 28, 2006, at Finding 544.

17. When underground cables fail, they are typically out of service for long periods of time. LaForest pf. at 6.

18. To place the 345 kV line underground would come at a significantly higher cost per mile of approximately $4 million to $8 million. This cost is derived, in part, from the necessary structures required with an underground cable. In each instance where an underground cable transitions to overhead, terminal connections are required that necessitate a transition station. These two stations (one at each end of the underground cable) would be each approximately the size of a small substation (approximately 200 x 300 feet). Each transition station would cost approximately $2.5 to $4.5 million. There would be additional cost to dismantle and underground the existing 115 kV line. Lind pf. reb. at 5; Litkovitz pf. at 2-3; LaForest pf. at 8.

19. Based on the wetlands that occupy sections of the right-of-way where a transition structure may fit, and areas of potential archeological sensitivity, it is unlikely that a transition structure could be sited on the Grices' property. Litkovitz pf. at 2.

20. Alternate above-ground routes to the route proposed by VELCO would require discussions with

adjoining property owners to obtain their agreement to reroute the line across their property or a condemnation of an easement. Alternate above-ground routes would also have resulted in the line having to be redesigned causing substantially higher construction costs. Lind pf. direct at 6.

21. An easterly alternative route was considered and would also involve the dismantling and rebuilding of the existing 115 kV structures, at an approximate additional cost of $628,000. Litkovitz pf. at 3; Johnson pf. reb. at 2.

22. The easterly route proposal would require the placement of a substantial portion of the 345 kV line to the east of the existing 115 kV line on the Grice property, behind a knoll and further away from the Grice residence and buildings. This proposal would also involve moving the existing 115 kV line to this location. Boyle pf. reb. at 3; Raphael pf. at 4.

23. The easterly route proposal is aesthetically inferior to the current proposed route for multiple reasons. First, when traveling south on Halpin Road, the easterly route would result in greater visibility of both the 115 kV and 345 kV lines. Second, the agricultural landscape would be visually compromised by the additional poles. The easterly route would undermine an open agricultural field and meadow, which would remain intact with the 345 kV line located in VELCO's proposed corridor and as part of the existing right-of-way. Raphael pf. at 4; Boyle pf. at 3; Litkovitz pf. at 3; Lind pf. reb. at 3.

24. The alternative easterly route would result in higher construction costs. Currently, the proposed easterly route would require removing multiple structures within the vicinity of the proposed easterly route: six 115 kV tangent structures and five 115 kV angle structures. As of August 2005, this alternative would cost an additional $628,000 to construct. In addition to this increased cost, VELCO would lose its existing investment in the existing 115 kV line. Johnson pf. reb. at 2; Lind pf. at 6; Litkovitz pf. at 3; Lind pf. reb. at 3-4.

25. A westerly alternative route was considered and would involve the dismantling and rebuilding of the existing 115 kV structures and would cost an additional $1 million to construct. Litkovitz pf. at 3; Johnson pf. reb. at 2.

26. The westerly alternative would require locating the 345 kV line to the west of the current 115 kV line, on the other side of Halpin Road, and moving the existing 115 kV line to this new location. Lind pf. reb. at 4; exh. VELCO-PWL-7, Proposed Westerly Route Map.

27. The westerly route proposal is inferior to VELCO's proposed route for multiple reasons. Raphael pf. at 5; Litkovitz pf. at 3; Lind pf. rebut. at 4.

28. The westerly route creates significant aesthetic problems by requiring a new corridor. The route would traverse over higher, more rugged terrain. The

increased height of this route creates potential visibility from Route 7. Raphael pf. at 5; Boyle pf. at 3; exh. VELCO-PWL-7.

29. The westerly route would be more costly. It would involve the dismantling and rebuilding of the existing 115 kV structures. This route would cost approximately $1 million based on a total project estimate from June 2005. Johnson pf. at 2; Lind pf. rebut. at 5; Litkovitz pf. at 3.

30. The easterly and westerly alternatives both would cross property of other landowners for which easements would need to be secured. Lind pf. reb. at 3-4.

Property and Rights Subject to Condemnation

31. The existing utility easement ("existing easement") that crosses the Grices' land is approximately 5,148 feet long, and 150 feet wide. This easement was originally granted to Central Vermont Public Service Corporation ("CVPS") in 1954 and was subsequently assigned to VELCO. Lind pf. at 3; exh. VELCO-TJC-4, West Rutland-New Haven, 345 kV Transmission Line Plan & Profile; exh. VELCO-TJC-5, Right-of-Way from E. Harley Grice & Doris H. Grice to CVPS.

32. VELCO constructed the existing 115 kV transmission line in 1954. The 115 kV line runs from West Rutland, Vermont, to New Haven, Vermont. Currently there are twelve existing double H-frame

poles for this 115 kV transmission line within the existing right-of-way on the Grices' property. Amended Petition at 42; Exh. VELCO-BKS-1 at A-12.

33. The Grices own the subject parcel under two trusts, the Marilyn M. Grice Revocable Trust, and the Harley A. Grice Revocable Trust. Amended Petition at 1.

34. The existing easement grants to VELCO, among other things:

> its successors and assigns, the perpetual right and easement to construct, inspect, operate, maintain, reconstruct, relocate and remove lines of poles or towers or both (which may be erected at different times) with wires and/or cables thereon for the transmission of electricity and the transmission of intelligence by electricity and all necessary foundations, anchors, guys, braces, fittings, equipment and appurtenances, including buried ground wires or cables, under, over and upon a strip of land . . . : Being a strip of land 150 feet in width . . . , said strip . . . , extending from our Southerly property line to our northerly property line. . . .

Exh. VELCO-TJC-5.

35. The existing easement also grants:

> the right, within said strip, to cut down, remove and keep cleared by such means as Grantee deems desirable, at any and all times such trees, underbrush, and vegetation

> as in the judgment of the Grantee may interfere with or endanger the efficient operation and use of said lines or any of their appurtenances when erected.

Id.

36. The existing easement grants:

> the right to enter upon and cross other property owned by the Grantor, for the purpose of gaining access to the aforesaid strip and of exercising any of the rights hereby conveyed; provided, however that said right must be exercised in a careful manner and any damage to the property of the Grantor caused by the Grantee shall be borne by the Grantee.

Id.

37. The existing 115 kV West Rutland to New Haven transmission line corridor is 250 to 350 feet wide, except in several locations, including where it crosses the Grices' land. VELCO requires a minimum 250-foot-wide corridor to build and operate the new 345 kV line next to the existing 115 kV line. Exh. VELCO-TJC-7.

38. VELCO seeks to obtain the following interests: (1) 100 foot right-of-way width on the easterly side of the existing right-of-way (in addition to the existing 150-foot right-of-way) to allow the construction and maintenance of a 345 kV line within this additional right-of-way and parallel to the existing 115 kV transmission line; (2) rights associated with location of construction equipment and maintenance

rights; and (3) limitations on damage liability associated with a requested right to enter and cross Grice property. Exh. VELCO-TJC-6; Lind. pf. at 3.

39. The proposed easement across the Grices' property, Exh. VELCO-TJC-6, would be 250 feet wide and approximately 5,148 feet long. The proposed easement would incorporate the existing 150-foot-wide utility easement originally granted to CVPS and sets forth the following rights:

KNOW ALL MEN BY THESE PRESENTS:

> THAT I, Harley A. and Marilyn M. Grice, of Middlebury, in the County of Addison and State of Vermont (hereinafter, whether singular or plural, called the Grantors, which term shall include the Grantor's successors, heirs and assigns), for and in consideration of the sum of One Dollar and other valuable consideration paid by the VERMONT TRANSCO LLC (hereinafter, together with its successors and assigns, called the Grantee), a corporation duly authorized and existing according to law with its office and principal place of business in the Town of Rutland, in the County of Rutland and State of Vermont, the receipt whereof is hereby acknowledged, do hereby GIVE, GRANT, BARGAIN, SELL AND CONVEY unto the said Grantee, to the fullest extent that the Grantee may deliver to be reasonably necessary or convenient in order to have the full benefit of this grant and easement, the perpetual right and easement to erect, construct, repair, maintain, reconstruct, relocate, operate and remove facilities for the transmission and/or

distribution of electricity and for the transmission and/or distribution of data, information, video and voice communications (any of which facilities may be erected at different times and at such voltages and capacities as the Grantee may from time to time determine) including lines, wires, poles, towers, cables, foundations, anchors, guys, braces, fittings, buildings, equipment and other structures, whether above the ground or on or beneath the ground, under, over and upon a strip of land owned by Harley A. and Marilyn M. Grice, in the Town of Middlebury, in the County of Addison and State of Vermont bounded and described as follows:

Being all that part of lands of the Grantor as are included within a strip of land 250 feet in width, said strip to be 75 feet wide on the westerly side and 175 feet wide on the easterly side of a survey line extending from my northerly property line to my southerly property line, which bounds shall prevail over the bearings and distances cited in the following description taken from the center line survey description in the right of way easement conveyed by E. Harley Grice and Doris H. Grice to Central Vermont Public Service Corporation by deed dated March 29, 1954 and recorded in the Middlebury Town Land Records in Book 53 at Page 479, said survey line therein described as follows:

Beginning at a point on land now or formerly of Fred C. Wheeler and Mabel A. Wheeler whose land adjoins the Grantor's land on the south, said point being South 1° 03' East and 340 feet from a fence corner marking the supposed northwest

corner of land now or formerly of said Fred C. Wheeler and Mabel A. Wheeler and a property corner of the Grantor's land; thence running about North 1° 03' West for a distance of 340 feet to said fence corner being a point in the property division line between land of the Grantor on the north and west and land now or formerly of said Fred C. Wheeler and Mabel A. Wheeler on the south and east; thence continuing on the same course of about North 1° 03' West across the Grantors' land for a distance of 3,568 feet to an angle point; thence running about North 29° 49' West, crossing the highway leading past the Grantors' farm premises, for a distance of approximately 1,548 feet to a point in the property division line between lands of the Grantor on the south and lands now or formerly of Amos Miller et al on the north, said point being about 412 feet west of a fence corner at the northeast corner of the Grantors' meadow which lies west of said highway.

As an aid to the above description reference may be made to Mile 28 and 29 of a set of plans entitled "Central Vermont Public Service Corporation, Middlebury-Essex Jct." on file in the offices of the Grantee.

For the exact dimensions of said survey line reference may be had to the final project plans of the Northwest Reliability Project to be filed in the Town of Middlebury Land Records upon completion of the project.

Title to the foregoing lands and premises was acquired by Warranty Deed of Harley A. Grice to

Harley A. & Marilyn M. Grice, dated August 17, 1982, recorded in Book 99, Page 61 and by Quit Claim Deed of Doris H. Grice, dated September 30, 1992, recorded in Book 144 Page 516 of the Middlebury Town Land Records.

Together with the right, during and in preparation for the construction or installation of any of the foregoing facilities, to place and store materials and equipment on lands of the Grantor adjacent to the Easement Area and within a distance of 50 linear feet of the boundary of the Easement Area, provided, that the Grantee shall return any lands used for such purposes to their previous condition as soon as practicable after the completion of construction or installation.

Together with the right, within said Easement Area, to cut down, trim, burn, spray with chemicals, and to remove and keep cleared by such means as the Grantee deems desirable, at any and all times, such trees, underbrush, and vegetation, or parts thereof growing within or overhanging such Easement Area as in the judgment of the Grantee may interfere with or endanger the efficient operation and use of said facilities (the first clearing may be for less than the full width and may be widened from time to time to the full width), and to remove all structures which are now found, or, [sic] in violation of the rights and privileges of the Grantee hereunder, subsequently placed on or within, such Easement Area; and also with the right, by planting, trimming and by any other means, to control the growth of vegetation within such Easement Area.

Together, also, with the permanent right at any and all times to enter on adjacent lands of the Grantor and to cut or trim and remove such trees growing outside the limits of the Easement Area which may, in the opinion of the Grantee, interfere with or be likely to interfere with, the successful operation of the facilities now or hereafter to be constructed on said Easement Area.

Together, also, with the right to install, maintain and replace anchors and guy wires on lands of the Grantor adjacent to and lying outside of the Easement Area where necessary to support such facilities.

Together, also, with the right to enter upon and cross other property owned by the Grantor for the purpose of gaining access to the Easement Area and of exercising any of the rights hereby conveyed; provided, however, that said rights must be exercised in a careful manner, and any damage to the property of the Grantor caused by the Grantee, other than as contemplated herein, shall be borne by the Grantee.

RESERVING, NEVERTHELESS, unto the Grantor the right to cross and re-cross the Easement Area at such places as may be necessary or desirable in using the lands adjacent thereto, provided, that such crossing and re-crossing shall not interfere with the rights hereby granted.

The Grantor hereby covenants that no building, line, conduit or any other structure or thing will be erected or placed within the limits of or upon the Easement Area, nor will any change in the grade or elevation of the Easement Area be

made, which, in the judgment of the Grantee, might interfere with the exercise of the rights hereby granted.

The Grantee shall have the right to assign to others, in whole or in part, any or all of the rights, privileges, and easements hereinbefore set forth.

TO HAVE AND TO HOLD the above granted rights and easements, with all privileges and appurtenances thereunto belonging, unto the said Grantee, its successors and assigns forever, to it and their own proper use, benefit and behoof; and also the Grantor covenants with the Grantee that at and until the ensealing of these presents the Grantor is well seized of said premises as a good indefeasible estate in fee simple, and has good right to sell and convey the rights and easements aforesaid in manner and form above written, and that the same are free from all encumbrances whatsoever, except the existing utility easement; and furthermore the Grantor agrees to warrant and defend the same to the Grantee and its successors and assigns forever against all claims and demands whatsoever.

Exh. VELCO-TJC-6; Lind, pf. at 4.

40. So-called "danger trees," which are trees considered to be a threat to power lines or related structures, can be found during routine line patrols, during routine maintenance, or when reported by landowners. It is critical that these trees are removed as soon as practical after discovery for reliability and

for the safety of the general public and landowner. Wright pf. at 3.

41. The right and ability to enter the property at any time to remove danger trees during an emergency or during routine maintenance are critical to maintaining the reliability of the VELCO system. Requiring exact trimming rights is not practical. Wright pf. at 3, 6.

42. The right to remove danger trees is also necessary to remain in compliance with the North American Electric Reliability Council ("NERC") Vegetation Management Standard. Wright pf. at 3.

43. At this time, VELCO anticipates constructing one proposed angle structure and all guy anchors within the area of the expanded Grice easement. Wright pf. at 4; exh. VELCO-TJC-7.

44. Although VELCO does not anticipate placing additional anchors outside of the right-of-way in the immediate future, it is possible that such anchors could be required. This right should not be further limited because it is impossible to predict what design changes or replacements could be required in the future. Wright pf. at 4, 6.

45. VELCO would notify the property owner regarding the placement of guys and anchors outside the right-of-way to the extent possible prior to any work. *Id.* at 4.

46. The right to enter upon and cross property owned by the Grices for purposes of gaining access to

the easement area is critical to all of VELCO's maintenance activities, including structure maintenance, pole testing, tree trimming, brush control, line inspection, and any other work requiring VELCO to access the right of way. Wright pf. at 4-5; tr. 8/28/06 (Vol. I) at 52 (Wright).

47. VELCO has approximately 1,300 easements that provide it with a broad right of access. Under these easements, VELCO has worked with landowners to modify the point of access when necessary to accommodate a landowner's plans to build a structure. In situations where a landowner would like to build a driveway or utility line to get power to a new house location, VELCO encourages constructing roads and driveways over the easement area because it gives VELCO better access to the line. VELCO's witness could not recall any case in the past eight years in which VELCO could not resolve a land-use issue with the involved landowner. Tr. 8/28/06 (Vol. I) at 62, 72, 75 (Wright).

48. The historical relationship with the Grices demonstrates VELCO's commitment to work with landowners. VELCO has worked with the Grice family the entire time the 115 kV line has been on their property. No conflicts have occurred regarding VELCO's access to the property. Tr. 8/28/06 (Vol. I) at 82 (Wright).

49. Requiring specific points of access to be designated in the easement would interfere with VELCO's ability to maintain the right-of-way and

perform the above activities. VELCO's right to access the land without the landowner's permission is essential because of the difficulties it can encounter in contacting the landowner, and its need to maintain the reliability and safety of the line. Tr. 8/28/06 (Vol. I) at 52 (Wright); Wright pf. at 7.

50. Limiting VELCO's specific points of access would present additional problems for VELCO and the landowner. First, the land and building structures can change over time. Requiring VELCO to access only specific points identified in 2006 would encumber it from performing its services if those points of access are not viable at some future date. Tr. 8/28/06 (Vol. I) at 54-55 (Wright).

51. Second, ownership of the property changes over time. If points of access were referenced in the easement deed, it could prevent a new property owner from using the land in a different way that would be inconsistent with a specific point of access. Tr. 8/28/06 (Vol. I) at 54-55 (Wright).

52. Third, specific points of access also restrict the landowner in what the landowner can and cannot do with the land. Tr. 8/28/06 (Vol. I) at 80 (Wright).

53. Consistent with its prior practice, VELCO would make its best effort to notify the landowner before entering the property. Wright pf. at 5.

54. The temporary right during construction to store materials and equipment on lands of the Grices adjacent to the easement area is necessary to allow

VELCO to construct the NRP. Tr. 8/28/06 (Vol. I) at 52 (Wright); Lind pf. at 5.

55. VELCO proposes to run Optical Ground Wire ("OPGW") cable across the Grice easement. VELCO plans to transmit and distribute data, information, video and voice communications with this cable. Nelson pf. at 3; exh. VELCO-DLN-1, OPGW General Data Sheet; tr. 8/29/06 (Vol. II) at 155 (Nelson).

56. The OPGW cable has seventy-two optical fibers. VELCO would reserve twenty-four of the seventy-two fibers for protective relaying and communications relating to protecting the transmission line. *Id.*

57. VELCO plans to lease to third parties the balance of the fibers in the OPGW cable. Nelson pf. at 4-5; tr. 8/29/06 (Vol. II) at 114, 132-33 (Nelson).

58. VELCO also intends to trade the excess capacity in the cable with other telecommunications providers to gain reliable access to VELCO's substations. This would contribute to the reliability of VELCO's system. Nelson pf. at 4-5; tr. 8/29/06 (Vol. II) at 117, 120 (Nelson).

59. VELCO's system does not have fiber optic cable on its structures from St. Johnsbury to Williamstown, from Irasburg to Williamstown, and from Coolidge to Vermont Yankee. VELCO estimates that the cost of installing fiber optic cable on existing structures is approximately $20,000 per mile. Rather

than pay to install fiber optic cable in these other areas of the state, VELCO would trade with other telecommunications providers the excess capacity in the OPGW in the corridor between Rutland and Burlington that includes the Grice's land. Tr. 8/29/06 (Vol. II) at 135-37, 141-42 (Nelson).

60. Currently, VELCO satisfies its communication needs by leasing facilities from Verizon. These facilities have not performed well for VELCO. Verizon's current capacity cannot provide the services that VELCO is seeking. VELCO would like to trade with one of the competitive local exchange carriers that already have fiber optic in that area instead of paying Verizon. Tr. 8/29/06 (Vol. II) at 140, 154 (Nelson).

61. The existing easement provides, in part, "the perpetual right and easement to construct, inspect, operate, maintain, reconstruct, relocate and remove lines of poles or towers or both (which may be erected at different times) with wires and/or cables thereon for the transmission of electricity and the transmission of intelligence by electricity. . . ." Exh. VELCO-TJC-5.

Discussion

Reasonable Necessity

By Order of July 21, 2006, the Board ruled that under 30 V.S.A. § 112, VELCO must demonstrate that its condemnation is reasonably necessary for it to

provide adequate service. In its Order, relying on *Latchis v. State Highway Board*, 120 Vt. 120, 134 A.2d 191 (1957), the Board articulated the scope of the necessity standard to impose in § 112 proceedings.[5] In *Latchis*, the Court considered the State Highway Board's authority to order condemnation of land pursuant to statute. The Court concluded that "[t]o justify a taking, the interests of the State must require it, and it must be so shown, but only to the extent that it is *reasonably necessary* to accomplish the end in view after weighing all the circumstances which bear on any given situation."[6]

In applying the *Latchis* decision to a § 112 condemnation process, the Board concluded that the approach articulated by the Vermont Supreme Court in *Latchis* would allow the Board "to set out a reasonable necessity test under § 112."[7] The Board affirmed the Hearing Officer's ruling that the "necessity of a project under 30 V.S.A. § 112 is distinct from the 'need' for a project, an inquiry under 30 V.S.A. § 248."[8] The Board reasoned that establishing in a § 112 condemnation proceeding whether there is a "need" for a project under § 248 "would be repetitious of work already undertaken, and would be far too extensive an inquiry to conduct for every condemnation

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[5] Order of July 21, 2006, at 5-12.

[6] *Latchis*, 120 Vt. at 124-25 (emphasis added).

[7] Order of July 21, 2006, at 10.

[8] *Id.*

petitioner that might come before the Board."[9] Thus, in this proceeding, VELCO must make the narrower showing that "the underlying project is reasonably necessary for the petitioner to provide adequate service."[10]

Ensuring Adequate Service

In Docket 6860, the Board found that the NRP would promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248, and issued a CPG to that effect. The Board found that the project was required to meet the need for present and future demand for electric services which could not otherwise be provided for in a more cost-effective manner through energy conservation programs and energy-efficiency and load management measures. In its Order in Docket 6860, the Board found, among other things that "[i]f nothing is done to correct the existing reliability problems, by the time the Vermont summer peak reaches 1,100 MW (forecast for between 2006 and 2009), loss of the West Rutland to Middlebury 115 kV (K-30) line or the Granite to Barre 115 kV (K-2 V) line would be a contingency that could result in voltage collapse."[11] The Board further found that

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[9] *Id.* at 8.

[10] *Id.* at 12.

[11] Docket 6860, Order of January 28, 2005, at 23, Finding 42.

"[w]ith further load growth, the list of critical contingencies increases."[12]

Since the Board's Order in Docket 6860, Vermont has experienced peak power load levels in excess of 1,100 MW. These levels have exceeded the projections considered in Docket 6860, and, it is reasonable to conclude, would further exacerbate the system reliability concerns identified in the Board's Order.[13]

As part of the NRP that the Board found necessary in January 2005, a 35.5 mile expansion and upgrade of electric transmission lines from West Rutland to New Haven was approved, whereby a 345 kV line would be constructed parallel to an existing 115 kV transmission line. Of this expansion and upgrade, approximately one mile is located on the Grice property adjacent to the existing 115 kV line.

Given that the Board found in January 2005 that the 345 kV line was needed and that recent system peaks have exceeded the projections that underlie the Board's decision, I conclude that the 345 kV line is necessary for VELCO to render adequate service to the public in the conduct of the business it is authorized to conduct.

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[12] *Id.*

[13] LaForest pf. at 3.

Proposed Route and Alternatives

While the record demonstrates that the necessity for the overall project has been established, there remains the question of whether it is necessary for the new line to traverse the Grice property. This question is best answered by first examining whether there are any reasonable alternatives to having the 345 kV line run across the Grice property adjacent to the existing 115 kV line as VELCO proposes. In this case, three alternatives were identified. The first alternative considered was to bury the new 345 kV line on the Grice property. As noted in the above findings, placing the line underground would pose a threat to system reliability and stability, would be especially costly, and would require relatively large, fenced transition stations at either end of the buried line.

The second alternative, the so-called easterly route, would require VELCO to dismantle and rebuild the existing 115 kV structures, with accompanying costs associated with redesigning and rebuilding those lines. The proposal would also bring with it numerous additional challenges associated with relocating on different property.

A third alternative, a westerly route, would also require the dismantling and rebuilding of the existing 115 kV structures and would be much more costly. As discussed below, the easterly and westerly routes are also aesthetically inferior to the route proposed by VELCO. There is substantial evidence on the record –

none of which was rebutted by the Grices – supporting these conclusions. I, therefore, conclude that condemnation of the Grice property as proposed by VELCO is necessary in order that the petitioner may render adequate service to the public in the conduct of the business it is authorized to conduct. I conclude that, subject to the discussion below, VELCO has demonstrated that its proposed route is necessary for purposes of VELCO's provision of adequate service.

Property and Rights Subject to Condemnation

The Grices take the position that VELCO has failed to submit a sufficient description of the lands that will be affected by the provisions in the proposed easement that address tree trimming outside the proposed easement area and right of access across other Grice lands.[14] The Grices contend that the easement provides for "'damage to the property of the Grantor to be borne by VELCO except for damage "contemplated herein," limiting language that is not found in the existing deed. Citing 3 V.S.A. Section 809, the Grices argue that without this information, they lack adequate notice of the extent of the rights to their lands that are being taken, and cannot effectively cross-examine VELCO's appraisers, or present

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[14] Proposed Findings and Conclusions Submitted on Behalf of Harley Grice et al. ("Grice Findings") at 22.

their own appraisal.[15] The Grices also argue that "without specification 'with certainty and accuracy' of the area affected by a 'danger tree' clause, or right of access, it is impossible for appraisers, public service boards or juries to accurately determine the landowner's damages."[16] The Grices contend that VELCO's petition should be dismissed or the danger tree and right of access clauses be stricken.[17]

VELCO contends that the standard found in 30 V.S.A. § 111, and interpreted by the Vermont Supreme court in *Vermont Electric Power Co. v. Anderson*, 121 Vt. 72 (1959), requires a description of (a) the principle right of way with "certainty and

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[15] *Id.* at 28. 3 V.S.A. § 809 requires that in a contested case,

> "all parties shall be given an opportunity for hearing after reasonable notice. In addition to a statement of the time, place, and nature of the hearing; statement of the legal authority and jurisdiction under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved, notice is supposed to include:
>
> > a short and plain statement of the matters at issue. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

Id. at §809(4).

[16] *Id.* at 27.

[17] Grice Findings at 22.

accuracy," and (b) secondary easement rights in "less precise terms."

I agree with VELCO's analysis. As explained below, VELCO's proposed easement meets the standards for certainty and accuracy imposed by Vermont law for the principal right-of-way, and properly uses broader terms for its secondary easement rights, such as the danger-tree and right-of-access provisions.

30 V.S.A. § 111 requires VELCO to generally describe the property or right taken. "Such corporation shall present a petition to the public service board and to the public service department describing the property or right, and stating why it is unable to acquire it without condemnation, and why its acquisition is necessary."[18] As discussed below, the Vermont Supreme Court has interpreted this statute as requiring the utility to describe only the principal right-of-way with certainty and accuracy, which it has defined as a description that will not mislead the landowner and that will allow any defect to be cured upon demand.

The Court has held that secondary easement rights, like the right of access or access to undertake vegetation management outside the easement area, can be "set forth in less precise terms."[19] In *Anderson*

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[18] 30 V.S.A. § 111(a).

[19] *Vermont Electric Power Co. v. Anderson*, 121 Vt. 72, 78 (1959).

the Vermont Supreme Court acknowledged the challenge of trying to identify "every eventuality that might arise in the future use of the property."[20] With respect to right of access, the Court acknowledged that a utility line easement "carries with it a reasonable right of access to enable the utility to discharge its legal obligation to render adequate and dependable service."[21] This reasoning applies equally to the provision allowing access for vegetation management. VELCO witness Wright provided substantial and unrebutted evidence supporting the conclusion that it is impractical to articulate easement deed language any more specifically than VELCO has provided. VELCO cannot be expected to know precisely which trees in the future may pose a threat to the transmission line or may need removal in order for VELCO to access the easement area. The ability to protect the transmission line from such trees is also critical to the rendering of adequate service.

Under *Anderson*, the secondary easement rights in the easement deed are adequate. In addition to providing a metes and bounds description for the principal right-of-way, the proposed easement also provides VELCO with secondary and implied rights. These are necessary "for the effective use of the right-of-way, e.g., access to, and the power to, cut trees and limbs that jeopardize the lines within the right-of-way."[22]

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[20] *Id.*

[21] *Id.*

[22] VELCO Reply Brief at 15.

Under *Anderson*, a company like VELCO can describe its vegetation management clause or right-of-access clause in less precise terms than as the principal right-of-way. The vegetation-management clause entitles VELCO to:

> enter on adjacent lands of the Grantor and to cut or trim and remove such trees growing outside the limits of the Easement Area which may, in the opinion of the Grantee interfere with or be likely to interfere with, the successful operation of the facilities now or hereafter to be constructed on said Easement Area.[23]

The right-of-access clause, which is similar to the clause approved in *Anderson* as a secondary easement right, grants Vt. Transco:

> [T]he right to enter upon and cross other property owned by the Grantor for the purpose of gaining access to the Easement Area and of exercising any of the rights hereby conveyed; provided, however, that said rights must be exercised in a careful manner, and any damage to the property of the Grantor caused by the Grantee, other than as contemplated herein, shall be borne by the Grantee.

These clauses granting secondary rights utilize language that is sufficiently broad to enable the

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[23] Exh. VELCO-TCJ-6.

utility to discharge its obligation to render adequate and dependable service, but also are as narrowly worded as could be, short of covering every eventuality that might arise in the future use of the property.[24]

With respect to danger tree provisions, the Grices rely on out-of-state cases that either have a different statutory requirement, or have interpreted their state's condemnation statutes differently than the Vermont Supreme Court has interpreted Vermont statutes. Significantly, these cases do not distinguish between the principal easement rights and secondary rights, which require less precice terms, as does the Vermont Supreme Court in *Anderson*. The Grices rely heavily upon an intermediate appellate court decision in *Georgia, Mosteller Mill, Ltd. v. Georgia Power Co.*, 609 S.E.2d 211 (2005).[25] In this case, the Georgia court required all rights in an easement to be described "with the same degree of definiteness as is required in a deed to land."[26] The *Anderson* court rejected this approach when it allowed a secondary right to be described with less accuracy than the principal right-of-way. For the same reasons, *Florida Power Corp. v. Griffin*, 144 So.2d 104 (Fl. D. Ct. App. 1962), another case relied upon by the Grices, is also inapposite.

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[24] *See generally*, Wright pf. at 3-6.

[25] *Georgia, Mosteller Mill, Ltd. v. Georgia Power Co.*, 609 S.E.2d 211 (2005).

[26] *Id.* at 213-214 (internal quotations omitted).

Under Vermont law, VELCO's danger-tree and right-of-access provisions are sufficiently detailed. I requested that VELCO present evidence on the need for these rights, which they have done.[27]

One final note, the Grices' appraiser, Mr. Larson, testified that he included consideration of these rights in his appraisal. Had there been insufficient notice, as the Grices argue, such an appraisal would not have been possible. During technical hearings, Mr. Larson was asked by VELCO's Counsel, "in your appraisal report is it true that you did not assign any specific or separate value to the additional easement clauses that VELCO has proposed for danger trees, guy wires and access?"[28] The witness answered, "[t]hat is true."[29]

Limiting Liability for Damages Associated with Accessing Grice Lands

VELCO's proposed easement also seeks to limit VELCO's liability for damage associated with its work within the proposed easement. This limitation is not contained in the existing easement which grants:

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[27] *See generally* Wright pf. at 3-6.

[28] *Id.* at 18.

[29] Tr. 9/6/06 (Vol. III) at 15 (Larson). I also note that the Grices' witness did not include in his appraisal the alternative approach offered by VELCO whereby they would have specific access points across the Grices' land.

> the right to enter upon and cross other property owned by the Grantor, for the purpose of gaining access to the aforesaid strip and of exercising any of the rights hereby conveyed; provided, however that said right must be exercised in a careful manner and *any damage to the property* of the Grantor caused by the Grantee shall be borne by the Grantee.[30]

The proposed easement grants:

> the right to enter upon and cross other property owned by the Grantor for the purpose of gaining access to the Easement Area and of exercising any of the rights hereby conveyed; provided, however, that said rights must be exercised in a careful manner, and *any damage* to the property of the Grantor caused by the Grantee, *other than as contemplated herein*, shall be borne by the Grantee.[31]

If, as VELCO witness Lind testified, VELCO seeks to add "a few particular line construction and ongoing maintenance rights that are consistent with the grant under the current CVPS easement," then VELCO cannot be seeking any rights that would be inconsistent with the grant under the current easement.[32] Since the "other than as contemplated" language is inconsistent, I conclude that it is not appropriate and

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[30] Exh. VELCO-TJC-5 (emphasis added).

[31] Exh. VELCO-TJC-6 (emphasis added).

[32] *See* Lind. pf. at 3.

that this limitation should be removed from the easement.

Transmission of Intelligence

According to VELCO, no party disputes that VELCO "can install OPGW in the shield wire for purposes of its own internal communications," and the Grices challenge only VELCO's authority under 30 V.S.A. § 112 to lease the excess capacity to third parties.[33] VELCO provides three reasons why it should not be prohibited from doing so. First, it argues that the "primary purpose" of VELCO's condemnation action is to construct the 345 kV line and expand the right-of-way, and that incidental benefits of the project are not relevant to a determination under § 112.[34] Second, VELCO argues that, in an action brought under § 112, "the Board has no jurisdiction" to determine whether VELCO has the authority to lease excess capacity to third parties.[35] Third, according to VELCO, even if it were "condemning land for the transmission of intelligence, the leasing of excess capacity relates to providing adequate transmission services and does not materially burden the property. . . ."[36]

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[33] VELCO Proposed Findings of Fact and Conclusions of Law at 40.

[34] *Id.*

[35] *Id.*

[36] *Id.*

The Grices argue that VELCO does not have a certificate of public good authorizing it to provide telecommunications service. According to the Grices, "Section 112 on its face does not authorize condemnation by an *electric* transmission company of rights to transmit *telephone* or other communications data."[37] In support of their position, the Grices cite 30 V.S.A. § 248(a)(2)(B) which reads in pertinent part, "no such company may exercise the right of eminent domain . . . unless the public service board . . . issues a certificate to that effect."[38] The Grices add that the Board has issued no such certificate to VELCO for the provision of communications services.

Additionally, the Grices argue that Article 2 of the Vermont Constitution limits condemnation proceedings to consideration of property and rights associated with public use. They write, "[i]t would be unconstitutional to take any rights of the Grices for a purely revenue-producing, commercial use, such as sale of telephone communication rights for profit."[39] The Grices maintain that VELCO's amended petition seeks authority to take property for which a need cannot be shown, and that therefore, VELCO's petition should be dismissed or the proposed inclusion of the easement rights for telecommunications should be striken.

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[37] Grice Proposed Findings and Conclusions of Law at 33 (emphasis in original).

[38] *Id.*

[39] *Id.* at 34.

The question of VELCO's authority to condemn property in order to transmit intelligence is a matter that was raised earlier in this investigation. In an Order dated June 23, 2006, I wrote:

> VELCO's authority in this context derives from the public purpose it exercises, i.e., its role as an electric transmission company. Thus, to the degree that it needs to transmit intelligence over lines to render adequate transmission service to the public, VELCO has the authority to take property rights to the extent necessary for that purpose. By the same token, however, VELCO does not have the authority to condemn land to place communications cable for purposes other than those related directly to its transmission-system-related communications needs.[40]

Subsequently, VELCO filed a letter in which it requested that "the Hearing Officer consider one additional issue discussed in the [Order of June 23, 2006] regarding the transmission of intelligence."[41] In its letter VELCO described the type of communication cable it plans to use, the various purported benefits of the use of that particular type of cable, and VELCO's plans to use the cable for its own purposes as well as "for use by third parties."[42] VELCO also took the position that the procedural Order of

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[40] Order of June 23, 2006, at 15-16.

[41] VELCO Letter of July 21, 2006, at 1.

[42] *Id.* at 2.

June 23, 2006, "allows for the placement and use" of this cable.[43]

In a further procedural Order dated July 31, 2006, in discussing the potential resolution of the question of VELCO's authority on this point, I stated that "the decision rule articulated is clear: VELCO's authority to condemn comes from the 'public purpose it exercises, *i.e.*, its role as an electric transmission company.'"[44] I noted, however, that there was a factual issue raised by VELCO's interest in placing a greater number of fibers than appeared to be necessary for it to provide service:

> The question that arises from this, however, is "to what extent does VELCO need to transmit intelligence over lines to render adequate service?" The answer to this question is more appropriately answered on the record by a VELCO witness, with opportunity for cross examination by the Department and the Grices, than it is being alleged in a letter by one of VELCO's attorneys.[45]

I further noted:

> It is clear that VELCO cannot condemn property for purposes of offering telecommunication services, but also that it can do so for purposes of providing adequate transmission service to the public. Therefore, the exact extent to which

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[43] *Id.*

[44] Order of July 31, 2006, at 8.

[45] *Id.* (citations omitted).

> it might be able to do this in this case is a factual matter that will require the development of an evidentiary record.[46]

Thus, the purpose of hearing testimony on this question was to determine whether VELCO had a sufficient justification for its proposed use of excess capacity to satisfy the requirements of § 112, i.e., whether VELCO could show that the condemnation of property and its expected use of this excess capacity is necessary for VELCO to provide adequate service. VELCO witness Nelson testified that VELCO currently satisfies some of its communication needs by leasing facilities from Verizon, but that Verizon's current capacity cannot provide the services that VELCO is seeking. VELCO, according to Mr. Nelson, would like to trade with one of the competitive local exchange carriers who already have fiber optic in that area and the capacity VELCO wants, instead of paying Verizon.[47]

I conclude that it is not necessary for VELCO to condemn the Grices' property in order to install excess communications capacity. If Verizon's services are unsatisfactory, then VELCO can purchase other services. If the desired services can be bought by VELCO, it is not reasonable to conclude that it is somehow necessary to take private property to enable VELCO to trade for, instead of purchase,

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[46] *Id.* at 10.

[47] Tr. 8/29/06 (Vol. II) at 140, 154 (Nelson).

telecommunications services. This is not necessary to VELCO's provision of adequate service.

VELCO has provided three reasons to support its claim that 30 V.S.A. § 112 authorizes it to condemn this land and install the communications services it proposes.[48] I find none of them to be convincing. VELCO first argues that the "primary purpose" of VELCO's condemnation action is to construct the 345 kV line and expand the right-of-way, and that incidental benefits of the project are not relevant to a determination under § 112.[49] This is not so. The "primary" versus "incidental" distinction is irrelevant. In using the power of condemnation, a company such as VELCO can install sufficient telecommunications infrastructure to enable it to provide adequate service.[50] It cannot use this authority to install excess infrastructure that, in essence, is designated to help VELCO make money or avoid paying for telecommunications services elsewhere on its system that VELCO could otherwise purchase.

Second, VELCO argues that, in an action brought under § 112, "the Board has no jurisdiction" to determine whether VELCO has the authority to lease excess capacity to third parties.[51] I disagree. Under

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[48] VELCO's Proposed Findings of Facts and Conclusions of Law at 40.

[49] *Id.*

[50] Order of July 31, 2006, at 8-10.

[51] *Id.*

§ 112, the Board has jurisdiction to consider whether the condemnation of a "property or right is necessary in order that" a company such as VELCO "may render adequate service to the public in the conduct of the business which it is authorized to conduct. . . ."[52] As explained above, under this statute, VELCO may only condemn property that is necessary to VELCO's provision of adequate service.

Third, VELCO contends that "the leasing of excess capacity relates to providing adequate transmission services and does not materially burden the property. . . ."[53] As the discussion above has concluded, the leasing of excess capacity is not necessary to VELCO's provision of adequate transmission services. Even assuming that installing excess capacity with which VELCO can generate revenue does "relate" to VELCO's provision of adequate service, the capacity is in excess of what VELCO needs. And since reasonable necessity is the statutory requirement condemning private property, the fact that this capacity is excess places it beyond the scope of VELCO's condemnation authority. For the same reasons, whether it "materially burdens the property" is irrelevant.

It is important to recognize that the conclusions here do not and should not obstruct VELCO from pursuing its telecommunications plans. First, while VELCO cannot use its condemnation authority to

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[52] 30 V.S.A. § 112.

[53] *Id.*

take the Grices' property for the purposes of installing telecommunications capacity in addition to that which is necessary for VELCO to provide adequate service, VELCO certainly can negotiate with the Grices for the use of their property. Secondly, it would appear from the broadly-worded easement deed associated with the existing 115 kV right-of-way that VELCO may be able to install communications cable with excess capacity across its existing easement, avoiding altogether the issue of condemnation for this purpose.

VELCO shall not be authorized by this easement to sell, lease, exchange or otherwise transfer any excess capacity in any data transmission facilities it installs in the easement expansion which is authorized by this Order. VELCO shall modify paragraph one of its easement deed to comply with this requirement by inserting the following underlined language:

> . . . facilities for the transmission and/or distribution of electricity and for the transmission and/or distribution of data, information, video and voice communications *as may be required for the operation of its electric transmission facilities* (any of which facilities may be erected at different times and at such voltages and capacities as the Grantee may from time to time determine). . . .

B. Orderly Development of the Region and Scenic Preservation

62. The proposed condemnation will not unduly interfere with the orderly development of the region

and scenic preservation. Findings 63 through 74, below.

63. From a land-planning perspective, the need for and presence of transmission lines and corridors is well-established. This type of infrastructure is commonplace in the landscape, although obtrusive and visually discordant in some locations. Raphael pf. at 5.

64. Locating upgrades in existing corridors keeps aesthetic impacts to current locations without adding new infrastructure and additional impacts elsewhere in the area or region where none exist. *Id.* at 3.

65. VELCO's use of the existing 115 kV transmission corridor is consistent with the Board's policy to place proposed transmission lines within or parallel to existing corridors. Docket 6860, Order of January 28, 2005 at 203, n. 201.

66. An alternative, easterly route would relocate the corridor to the northeast of the existing knoll, distancing it from the Grice residence and buildings. Raphael pf. at 4.

67. The easterly alternative would improve the visual conditions for the Grices but would result in a more visible and severe impact on the public view of the line when viewed from Halpin Road. The easterly alternative is less aesthetically acceptable than VELCO's proposed route because the easterly alternative would undermine an open agricultural field

and meadow which otherwise remains intact if the new 345 kV line is located in the existing corridor and right-of-way. *Id.*

68. The impact to the public "view from the road" of the easterly route has to be balanced with the benefits that would accrue to the Grices from the proposed relocation. When this tradeoff is weighed, the easterly alternative would result in more adverse aesthetic impact to the public as a whole. *Id.*

69. The alternative westerly route would traverse over higher and more rugged terrain, and the potential visibility and exposure of the line would result in significant adverse aesthetic impacts. *Id.* at 5.

70. The route proposed by VELCO follows an existing and well established corridor which is part of the land-use patterns of the town and region and is identified in the Middlebury Town Plan. *Id.* at 5; Boyle pf. at 4; Raphael pf. at 5-6; Lind pf. reb. at 6.

71. The Middlebury Town Plan states, in pertinent part:

> The existing VELCO 115 kV transmission corridor runs through Middlebury with a major substation in Quarry Road. This corridor has been planned with a widened right-of-way through most of Middlebury.
>
> VELCO has proposed an additional transmission line of 345 kV to be constructed in its right-of-way next to the 115 kV line.

> There should not be any new major transmission corridors or lines planned through the Town.

Raphael pf. at 5-6; Exh. Grice Cross-15, Middlebury Town Plan.

72. With respect to the Middlebury Town Plan, the Board found in Docket 6860 that the NRP "will not contravene any land conservation measures contained in Middlebury's plan." Docket 6860, Order of January 28, 2005 at 188, Finding 581.

73. The proposed route does not contravene any local or regional planning provisions and does not impact any land conservation measures set forth by the Town of Middlebury. Raphael pf. at 6.

74. The proposed route will not unduly interfere with the orderly development of the region. *Id.*

Discussion and Conclusions

Under 30 V.S.A. § 112, the condemnation of the property or right must not unduly interfere with the orderly development of the region and scenic preservation.

The 345 kV line upgrade across the Grices' land does not interfere with the orderly development of the region and scenic preservation. First, the presence of high-voltage transmission lines are not uncommon in Vermont's rural agricultural landscape. The route proposed by VELCO is identified in the Middlebury Town Plan because it follows an existing

and well-established corridor. Furthermore, the route does not impact any land-conservation measures set forth by the Town of Middlebury and is consistent with the land use patterns in the town and region.

Second, by planning and utilizing an existing utility corridor, the 345 kV line should minimize local impacts.[54] VELCO's proposal to follow the existing 115 kV line on the Grices' property prevents the opening of a completely new right-of-way. Both the easterly and westerly alternative routes would require new corridors and both alternatives would likely result in greater adverse impacts. Furthermore, since the existing 115 kV line was built in the mid-1950s, the land use associated with the existing right-of-way has had ample time to adapt to the presence of the existing transmission corridor.

For these reasons, I conclude that VELCO's proposed condemnation will not unduly interfere with the orderly development of the region or its scenic preservation.

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[54] This Board has recognized such advantages in another case involving the parallel placement of an upgrade parallel to an existing corridor. *See* Docket 4381, Order of March 6, 1980 at 4, Finding 12.

C. Damages

Property Description

75. The Grices' property is situated along the Middlebury/New Haven town line within the Town of Middlebury, 1.75 miles from the center of Middlebury. Exh. VELCO-BKS-1 at 2.

76. The Grice property is an approximately 319.6 acre parcel of rural land, including an approximately 3.6 acre building site, 100 acres of tillable/hay land, 175 acres of open to wooded pasture land, and 41 acres of wooded to semi-wooded land. Exh. VELCO-BKS-1 at 13, 18.

77. The property ranges from above to below road grade. Topography is generally gentle sloping to sloping, with slope phases ranging from approximately 2% to 50%. The Muddy Branch of the New Haven River crosses the property along its easterly boundary. Exh. VELCO-BKS-1 at 19.

78. The predominant soils found on the parcel include Vergennes clays and Farmington extremely rocky silt loams. Lesser amounts of other types are also found on the parcel. All of these soils typically exhibit restrictions with regard to building development without special engineering for a variety of reasons, including slow percolation, wetness, flooding, slopes, and shallow depths to bedrock. Exh. VELCO-BKS-1 at 20; tr. 9/6/06 (Vol. III) at 46-47 (Larson).

79. The property is improved with three single-family residences, a former dairy barn, a semi-finished workshop, several storage buildings, and miscellaneous land improvements. Exh. VELCO-BKS-1 at 2, 18.

80. The main dwelling is a two-story, approximately 2,166 square foot structure, with an attached, 22' x 22', 1½ story two bay garage. The dwelling is approximately forty-five years in age. The overall quality of the structure is considered to be average to good and the condition is considered to be above average. Exh. VELCO-BKS-1 at 14-16.

81. The second residence is a 1½-story, approximately 1,624 square foot structure located on the west side of Halpin Road. There is no garage. Construction quality is average to good and the structure is in average to good condition. The building is approximately nineteen years in age. Exh. VELCO-BKS-1 at 16-17.

82. The tenant house is a one-story, approximately 696 square foot structure. The building is approximately sixty-five years in age. Exh. VELCO-BKS-1 at 17.

83. The dairy barn complex is a 1½ story barn with approximately 5,468 square feet, with an attached 144 square foot milk house and two attached lean-to structures containing approximately 1,162 square feet and 945 square feet, respectively. Exh. VELCO-BKS-1 at 17.

84. The workshop is one story. The overall condition of the structure is average to above average. Exh. VELCO-BKS-1 at 18.

85. The miscellaneous storage sheds and outbuildings include a pole shed shelter, large storage barn, storage shed, and garage complex. The overall condition of the sheds is fair to average. Exh. VELCO-BKS-1 at 18.

86. There is a dump situated on the property. Tr. 9/6/06 (Vol. III) at 20-21(Larson).

87. Approximately 18.8 acres of the property is already encumbered by the existing 150-foot-wide utility easement, as well as several narrower existing electric utility distribution line easements. The existing easement is 150 feet wide and traverses the property for a total distance of 5,456 feet. Exh. VELCO-BKS-1 at 18-19.

88. The Grices' neighborhood is in a rural residential, a mix of farmland and single-family residential lots. Improvements in the neighborhood are typically rural residential homes and are generally in average to good condition. The neighborhood is subject to local zoning, and lies within the Agricultural/Rural Residential zoning district. The dominant land uses in the immediate area are generally rural residential as well as limited agricultural uses. Both parties' appraisers assume that the property is in conformance with applicable zoning regulations. Exh. VELCO-BKS-1 at 6, 12.

89. The Grices' property is currently assessed by the Town of Middlebury for $853,500. The most recent assessment date is April 1, 2005. The common level of appraisal or the equalized assessment level, as reported in the 2006 Annual Report of the Vermont Department of Taxes, Division of Property Valuation and Review for Middlebury, as of January 1, 2006, was 109.11%. Based upon the reported equalization rate, the effective tax assessment of the subject property is approximately $783,238. Exh. VELCO-BKS-1 at 10; tr. 8/29/06 (Vol. II) at 39 (Silver).

90. As of January 20, 2006, the value of the subject property was $800,000. Exh. VELCO-BKS-1 at 53.

91. Before the proposed easement, the highest and best use of the unimproved vs. improved subject property do not differ greatly: the unimproved highest and best use is for agricultural use with very limited residential development, and the improved use is for agricultural use and rural residential with secondary residences and additional acreage. Exh. VELCO-BKS-1 at 28-30; tr. 9/6/06 at 37-41, 80 (Larson).

92. After the proposed easement, the highest and best use after the easement expansion as improved would be rural residential with secondary residences and additional acreage. The unimproved use would be for agricultural or rural residential acreage with some development potential. Exh. VELCO-BKS-1 at 65-66.

93. After the proposed easement expansion, the property would contain the same improvements as found on the property in the "before" situation, and the property would remain the same, but for the widened portion of the easement. Because the easement expansion would have minimal impact on the property, the overall utility of the property would change only minimally. Thus, the highest and best uses of the property before and after the easement expansion are the same. Exh. VELCO-BKS-1 at 65-66; tr. 9/6/06 (Vol. III) at 51(Silver).

94. The changes to the property are the additional encumbrance which augments the current easement with a 100-foot-wide transmission line easement, as well as two additional 50-foot-wide (one on each side of the proposed transmission easement, therefore 100 feet total) temporary construction easement. Both of these additional easements run parallel and contiguously with the existing easement. Exh. VELCO-BKS-1 at 59.

95. The easement expansion would decrease the Grices' property value for three reasons. First, the amount of acreage found in tillable and pasture land would decrease by an area of 12.5 acres, while the acreage of land encumbered by a transmission-line easement would increase. These damages are reasonably allocated as follows: $5,625 for tillable land lost and $4,843 for pasture land lost. Exh. VELCO-BKS-1 at 69, 76.

96. Second, the easement deed would allow the easement holder to store equipment and materials within fifty feet of either side of the proposed easement, an area of 12.5 acres, amounting to $10,468 worth of damages, i.e., $837 per acre. Exh. VELCO-BKS-1 at 76.

97. Third, due to severance damages resulting from the reduction in the size (by two acres) of a potential building envelope of a triangular area of tillable land, located on the northeasterly corner of the portion of the subject property, and situated on the westerly side of Halpin Road, an amount of $1,800 should be allocated. Exh. VELCO-BKS-1 at 60, 76; tr. 8/29/06 (Vol. II) at 79-80.

98. The value of the subject property immediately after the easement expansion is $775,000. The amount of just compensation is $25,000. Exh. VELCO-BKS-1 at 69, 76.

Discussion and Conclusions

Introduction

For the reasons set out below, I conclude that VELCOS' testimony on damages – though questionable in certain respects – is the more credible of the two parties' testimony on this issue.[55] I further

[55] Although not presenting testimony on this matter, the Department provided comments and a proposed amount of compensation for damages. Department Brief at 16.

conclude that the "before"[56] value of the Grices' parcel is $800,000, and the "after" value is $775,000. A comparison of the before and after values results in a total compensation value of $25,000, consisting of $21,000 for the land taken and $1,800 for severance damages.[57] No party argued for, or presented evidence on, consequential damages.

Background

30 V.S.A. § 112(3) provides that compensation is to be:

> based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the value of the remaining property or rights of the owner, and consequential damages.[58]

VELCO and the Grices have presented testimony that is widely at variance as to the value of the

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[56] The property prior to the proposed easement expansion is referred to as the "before" situation and the property after the proposed easements is referred to as the "after" situation.

[57] VELCO's appraisers round off the $22,800 figure to $25,000. *See* exh. VELCO-BKS-1 at 76.

[58] 30 V.S.A. § 112(3). VELCO filed its petition on September 23, 2005, and the Grices' and VELCO's valuation dates were January 19, 2006, and January 20, 2006, respectively. No party has raised this issue, nor is there anything in the record to suggest that the difference of four months is material to the valuation of the Grices' property.

Grices' property before and after the proposed condemnation, and the proper compensation to be paid for the easement. Compensation, in this context, is measured by the "difference between the value of the whole parcel immediately before the taking and the value of the remaining part immediately after the taking."[59]

The use upon which the value of a piece of property is based is an appraiser's determination of "highest and best use."[60] This determination is a two-part analysis: an analysis of the property as if unimproved, and an analysis of the subject property in total including the buildings and site improvements.[61] VELCO's appraisers made a determination that the highest and best use of the unimproved and improved subject property before the proposed easement did not differ greatly: the unimproved highest and best use is for agricultural use with very limited residential development, while the improved use is for agricultural use and rural residential with secondary residences and additional acreage. This determination is essentially the same as that of the Grices' appraiser who concluded that the highest and best use is a

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[59] Docket 4733, Order of June 1, 1983, at 221-22, Finding 45, citing *Record v. State Highway Bd.*, 121 Vt. 230 (1959).

[60] *See* exh. VELCO Cross 1, Uniform Appraisal Standards for Federal Land, § A-14 at 17; exh. VELCO-BKS-1 at 27.

[61] Exh. VELCO-BKS-1 at 27.

gentleman's farm or an agricultural/residential property with excess acreage.[62]

In April 2005, the Grices' property was assessed by the Town of Middlebury for $853,500. The common level of appraisal or the equalized assessment level, as reported in the 2006 Annual Report of the Vermont Department of Taxes, Division of Property Valuation and Review for Middlebury, as of January 1, 2006, was 109.11%. Based upon the reported equalization rate, the effective tax assessment of the subject property is approximately $783,238.[63]

The "Before" Value

In this section I conclude that VELCO's appraisers provide more compelling testimony than does Mr. Larson, the Grices' appraiser, on the "before" value of the Grices' property. I reach this conclusion for two reasons, as I explain more fully below. First, Mr. Larson's weighting and adjustments to the value of the properties he has chosen are inappropriate. Second, while the methodologies employed by both parties' appraisers rely upon sampling properties that are comparable to the Grices' property, I find Mr. Larson's analysis to be uninformative due to the discrepancy between the size of the parcels upon

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[62] *See* exh. VELCO-BKS-1 at 28-30; tr. 9/6/06 at 37-41, 80 (Larson).

[63] Exh. VELCO-BKS-1 at 10; tr. 8/29/06 (Vol. II) at 39 (Silver)

which his analyses are based and the size of the Grices' property. A significant number of his samples do not appear to be representative of the Grices' property. While VELCO's appraisers also choose certain sales that do not appear to be "comparable" to the Grices' property, these sales do not comprise as significant a portion of their overall collection of comparable samples, and thus their analysis presents a more reliable assessment of the value of the Grices' property.

Both parties undertook analyses to determine the before value of the Grices' property. VELCO's appraisers, the Silvers, and the Grices' appraiser, Mr. Larson, conducted Sales Comparisons, an approach requiring an appraiser to deduce from the available data of recent sales of similar properties the amount for which the property under appraisement would sell if it were exposed on the open market for a reasonable length of time.[64] In addition, Mr. Larson undertook a Cost Approach analysis, although he indicates that he places greatest weight on the results of his Sales Comparison analysis.[65] Using the Sales Comparison approach, VELCO's appraisers estimate the value of the property, as of January 20, 2006, to be

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[64] Grice RRL-1 at 41; VELCO-BKS-1 at 34.

[65] Exh. GRICE-RRL-1 at 61.

$800,000.[66] Using the same approach, the Grices' appraiser values the property at $1,050,000.[67]

In their Sales Comparison analyses, VELCO's and the Grices' appraisers analyzed sales and allocated contributory values to the improvements and land in order to establish the values that contribute to the total value of similar rural residential property in the real estate market. Both parties' appraisers made adjustments for particular classes of the land based on size, topographic features, soil and drainage conditions, differences in location, and other variables. Adjustments for improvements were based on size, condition, and utility of the individual structures. The appraisers adjusted the property values for time, and for lot size. Mr. Larson also made adjustments for location.[68]

The Silvers analyzed eleven sales between 2000 and 2005 of agricultural/rural residential properties within Addison County. They considered the properties they selected to be comparable in size to the Grices' 319-acre property. These properties range in size from 107 acres to nearly 410 acres.

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[66] Exh. VELCO-BKS-1 at 53.

[67] Using the Cost approach, the Grices' appraiser determined that the land is worth $1,040,000. *See* exh. GRICE-RRL-1 at 61.

[68] VELCO's appraisers made no adjustments due to location because the sales they selected were all in Addison County, what they considered to be a relatively homogenous area. *See* exh.VELCO-BKS-1 at 48.

The Silvers adjusted the land value of sales of land subject to conservation easements. They contend that conservation easements significantly impact land value. They also maintain that property encumbered with a transmission line easement would be worth less than land encumbered by a conservation easement. Seven of the their eleven sample sales were encumbered by conservation easements. The encumbrances on these properties were greater in acreage than the current easement on the Grices' land; VELCO's appraisers adjusted the sale prices to account for this difference.

When comparing the selected sales with the subject property, the Silvers provided a value for all the improvements, land improvements, and land. Their land valuation was sub-categorized into "land not subject to the preexisting easement," and "land subject to the preexisting easement."[69] In their contributory analysis of the sales, VELCO's appraisers derived the value for encumbered land by examining the contributory values of property encumbered by conservation easements. They then established a range of values for the contributory value of tillable and pasture land encumbered by a conservation easement. They also established a range of values for unencumbered wooded, tillable, and pasture lands.

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[69] Exh. VELCO-BKS-1 at 33; tr. 8/29/06 (Vol. II) at 67-68 (Silvers).

In applying the Sales Comparison Approach, the Grices' appraiser relied on five sales between 2004 and 2006 in the towns of Cornwall, Ferrisburg, Middlebury, and Addison. In his analysis, Mr. Larson weighted market values.[70] The weighting scheme doubled the weight for sales #2, #3, and #4.[71]

VELCO has argued that Mr. Larson's Sale #1, which was given less weight, appears to be far more comparable to the Grices' land than do other sales that Mr. Larson weighted more heavily. Given some of the characteristics of his other sales, this weighting does not appear to be reasonable. Mr. Larson's Sale #1 appears comparable to the Grice property in numerous respects. First, its location, Cornwall, is closer to the Grice parcel than some of the other sales that he weights more heavily, for example, Sale 3.[72] Second, the size of the parcel in Sale #1 (438 acres) is closer to the size of the Grice lands than are the

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[70] Larson pf. at 59-60; tr. 9/6/06 (Vol. III) at 64-65 (Larson); exh. VELCO-BKS-1 at 73. Mr. Larson explained that the adjustments to these sales were based upon factors, that included soil condition, value of accessory dwellings, creek frontage, and views (Sales #1); road frontage and primary dwelling (Sale #2); parcel size, views, primary dwelling, and number of dwellings (Sale #3); views, parcel size, road frontage, primary dwelling, and out buildings (Sale #4); location, parcel size, views, road frontage, and primary dwelling (Sale #5).

[71] Tr. 9/6/06 (Vol. III) at 64-65 (Larson); Grice-RRL-1 at 58-59.

[72] Mr. Larson acknowledged that the parcel in Sale #1 and the Grice lands were comparable in their proximity to Middlebury. Tr. 9/6/06 (Vol. III) at 56 (Larson); Grice-RRL-1 at 44.

parcels in Sale #3 (135 acres), Sale #4 (99.2 acres), and Sale #5 (88.1 acres). Third, there are further similarities between Sale #1 and the Grices' property that Mr. Larson's weighting scheme does not appear to reflect, e.g., the similarity in size of the main dwelling and condition of outbuildings to those on the Grice property.[73] Fourth, the Sale # 1 property is located in a low-density area, as is the Grices' property (and the other selected sales).[74] Fifth, as Mr. Larson noted in his report, "like the subject, this sale has frontage on a creek and has good views."[75]

Mr. Larson gave least weight to Sale # 1 because "it is on a state highway with farmstead exposed to traffic noise."[76] Mr. Larson did not explain how, and to what extent, the highest and best use of the Sale #1 property would be affected by traffic noise. He recognized that the Sale #1 property is being used for raising alpacas, but maintained that the property's highest and best use is residential. Even assuming that its highest and best use is residential, Mr. Larson's discussion of the matter was neither conclusive nor compelling as to why the property should be given less weight.

Additionally, I do not find Mr. Larson's adjustments made with respect to primary and additional

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[73] Tr. 9/6/06 (Vol. III) at 57 (Larson).

[74] Tr. 9/6/06 (Vol. III) at 62 (Larson).

[75] Exh. Grice-RRL-1 at 58.

[76] Exh. Grice-RRL-1 at 60; tr. 9/6/06 at 35, 59.

dwellings on some of his sample properties to be appropriate. For example, Mr. Larson notes, with respect to Sale #1, that the "dwelling has similar appeal [i.e., similar to the primary dwelling on the Grice property], is slightly larger than the subject dwelling, but is in poorer condition."[77] Also, because the subject property has "two additional residences: an old cape and a new saltbox," and both are "occupied by members of the Grice family," a "large adjustment is made on the value of these two accessory dwellings."[78] Thus, part of the adjustment made to Sale #1 is due to a main dwelling being in poorer condition than the Grice dwelling, and also due to the fact there are no additional residences. One would expect this comparison to carry over to his other samples, but that does not appear to be the case. Mr. Larson does not make the overall adjustment to Sales #2, #3, and #4, although he characterizes the dwellings on two of those properties in the same manner as he characterizes the dwelling in Sale #1. For Sale #2 he writes that the "dwelling is much inferior to the subject dwelling." Likewise for Sale #3, he indicates that the house is "inferior to the subject dwelling." He notes that Sale #2 has no "additional dwellings," and that Sale #3 "has only one dwelling." For Sale #4, since he provides no indication as to whether there are additional dwellings, presumably there are none. While it appears that these other sales possess

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[77] Exh. Grice-RRL-1 at 58.

[78] Exh. Grice-RRL-1 at 58.

similar shortcomings to Sale #1, it is only Sale #1 that receives "a large adjustment."[79]

In addition to concerns over Mr. Larson's overall weighting of his sample sales, there are questions as to the appropriateness of the parcel sizes of sample sales used by both parties' appraisers. Because there is a direct correlation between relative parcel size and per acre value, I find that certain of the choices for comparables are too small (and too inflated in value) to be of use in helping to determine the value of the Grices' property.[80] For example, in his Sales Comparison Approach developed by Mr. Larson, there are five sales:

Sale Date	Sale Price	Acres	Per Acre
#1 February 2005	$647,000	438	$1,477
#2 December 2005	$525,000	303	$1,733
#3 February 2005	$632,000	135	$4,681
#4 December 2004	$625,000	99.2	$6,300
#5 May 2004	$535,000	88.1	$6,073[81]

[79] Exh. Grice-RRL-1 at 58.

[80] The Board in Docket 4733 was faced with testimony similar to the testimony that has been presented in this investigation. The Board found that the appraisers for both parties provided testimony that was "substantially at variance as to value," and that "[o]ne reason for the difference in value of the four properties used as comparables by both appraisers is the difference in their sizes." Docket 4733, Order of June 1, 1983, at 11, 15, Findings 23, 31.

[81] Exh. Grice-RRL-1 at 56-61.

In reviewing the parcel size of Mr. Larson's samples, it appears that Sale #2 (303 acres) is closest in size to the Grices' property (319 acres). However, the parcels in three of the sales he chose, Sales #3, #4, and #5, are much smaller than (less than half the size) the Grices' property. Because of this discrepancy in size, it is not reasonable to treat Sales #3, #4, and #5 as comparable to the Grices' property. Removing these questionable sales reduces the number of his samples from five to two.

In their Sales Comparison approach, VELCO's appraisers rely upon eleven sales ranging in size from 107 to 410 acres:

Sale Date	Sale Price	Acres	Per Acre
#1 April 2002	$185,000	334.0	$553
#2 August 2004	$400,000	409.5	$976
#3 July 2001	$320,000	355.0	$901
#4 May 2002	$375,000	400.0	$937
#5 December 2005	$525,000	303.0	$1,732
#6 July 2004	$290,000	170.0	$1,705
#7 January 2005	$575,000	296.0	$1,942
#8 December 2003	$250,000	116.5	$2,145
#9 May 2003	$525,000	227.7	$2,305
#10 December 2004	$350,000	107.0	$3,271
#11 October 2003	$935,000	184.0	$5,081[82]

[82] Exh. VELCO-BKS-1 at 36, Table III, 45.

Although not as large a percentage of their sample, VELCO's appraisers' selection of sales also contains some significantly smaller parcels. Two of the eleven samples are less than one-half the size of the Grices' property.

The discussion above illustrates the extent to which both parties' appraisers have gone to find comparable properties. As the Board has found in these circumstances, "the parcels which furnish the best indication of value are those of similar large size."[83] However, not only does lot size affect the contributory values of the individual sites, "it is a common market phenomenon that as the size of the parcel increases, the per acre value decreases and vice versa."[84] While adjustments have been made to recognize for this difference, the greater the discrepancy in size, the larger the adjustment has to be. Furthermore, "[a]s the size of an adjustment increases, overall reliability of the sales comparison process decreases."[85]

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[83] Docket 4733, Order of June 1, 1983, at 19-20, Findings 39-40 (property appraisers relied on small parcels compared with the subject property, and Board concluded that giving weight to larger parcels was appropriate). *Id.*

[84] Docket 4642, Order of August 12, 1982, at 27, Finding 57 ("[S]mall parcels sell for a greater amount per acre than large ones."); exh. VELCO-BKS-1 at 36, 45.

[85] Exh. VELCO-BKS-1 at 73.

Three of the five selections relied upon by Mr. Larson in his Sales Comparison analysis are less than half the size of the Grice property. Because the per-acre price of property varies so significantly with parcel size, I conclude that it would not be reasonable to rely upon Mr. Larson's Sales Comparison analysis. The majority of his sales are far smaller than the Grices' property and, for that reason, cannot be considered to be comparable in value. Because I do not consider three of his five samples – due to their size – to be comparable, I am unable to rely upon Mr. Larson's Sales Comparison analysis or the testimony based upon it.

By contrast, in developing their Sales Comparison analysis of the "before" value of the Grices' land, VELCO's appraisers relied upon a greater number of samples and, in large part, the properties chosen can be considered comparable to the Grices' property. As explained in the discussion above, only two of the eleven samples are less than half the size of the subject property. I thus conclude that the Sales Comparison analysis presented by VELCO's appraisers is more credible than that presented by the Grices' appraiser.

Finally, I also conclude that Mr. Larson's Cost Approach analysis does not provide a reliable "before" value for the Grices' property. Mr. Larson relied upon seven sales in developing his Cost Approach analysis:

Sale Date	Sale Price	Acres	Per Acre
#1 December 2005	$170,000	57.6	$2,951
#2 November 2004	$300,000	72	$4,167
#3 November 2005	$292,000	94.3	$3,097
#4 July 2004	$295,000	98	$3,010
#5 November 2005	$295,000	117	$2,385
#6 September 2003	$300,000	228	$1,316
#7 March 2006	$306,350	269	$1,139[86]

As with Mr. Larson's Sales Comparison Analysis, his samples here suffer from substantial size discrepancy compared to Grices' property. The Grices' property is at least twice the size of five of seven of Mr. Larson's sales, Sales #1 through #5. Because of the difference between their size and the size of the Grices' property, I cannot conclude that Sales #1-#5 are comparable.

Before continuing with a discussion of the sampling used by VELCO's appraisers, I would like to make several observations regarding Mr. Larson's use of the cost approach. This analytical approach:

> presumes that a reasonable purchaser would not pay more than the cost to produce a substitute property offering the same utility as the subject property. Therefore, the Replacement or Cost Approach assumes that

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[86] Exh. VELCO Cross 1 at § A-17, at 21; exh. Grice-RRL-1 at 42.

> the costs to construct the improvements, less depreciation from all factors, when added to the land value, usually indicate maximum property value. The Cost Approach is not utilized in the appraisal of vacant land and is most reliable when the improvements are new.[87]

Because the cost approach is "most reliable when the improvements are new," and the structures on the Grice land are not new, I conclude that this methodology is of little use in the valuation of the Grices' property. I, therefore, reject Mr. Larson's cost approach as inappropriate for valuation of the Grices' property.

For all the reasons set out above, I conclude that Silvers' market value for the Grices' property of $800,000 before the Easement Expansion is the most reliable value in the record. $800,000 is an amount that reflects, in large part, comparable sales in the region with reasonable adjustments.

"After Value"

Both parties presented analyses of the "after" value of the Grices' property, although VELCO's appraisers and the Grices' appraiser used different approaches. Mr. Larson conducted a "Paired Data Analysis." The Silvers employed a Sales Comparison method. Using his findings from the paired data

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[87] Exh. Grice-RRL-1 at 41.

analysis, Mr. Larson valued the taking due to the easement expansion at $416,850. VELCO's appraisers concluded that the value of the taking is $25,000. From my review of their analyses, and for the reasons I set out below, I conclude that VELCO's Sales Comparison approach provides a reasonable estimate of all damages due to the Grices.

The technique that Mr. Larson employed, a Paired Data Analysis, is a "quantitative technique used to identify and measure adjustments to the sale price . . . of comparable properties; to apply this technique, sales . . . on nearly identical properties are analyzed to isolate a single characteristic's effect on value. . . ."[88] In explaining how the paired data analysis approach works, Mr. Larson provided the following testimony:

> Appraisers do this all the time to determine how much adjustment to make for a chimney or a garage or whatever. You find two sales that are similar in – as similar as possible. Ideally identical houses in the same development that sold within a few days of each other. One has a one car, one has a two car, and you find the difference between the two is 2 thousand dollars. So you use that information to make the 2 thousand dollar adjustment to comparables when you find differences to make – to quantify the

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[88] Tr. 9/6/06 (Vol. III) at 92-93 (Larson); exh. VELCO Cross 23, The Appraisal of Real Estate: Twelfth Edition, at 439.

> contributory value of a two-car garage versus a one-car garage. That's how we appraisers apply that technique constantly.[89]

While the example of how a paired data analysis should work is a clear one, Mr. Larson acknowledged that his example is an ideal one. The context in this case is not quite so clearly defined as his one-car garage property/two-car garage property example. Here, Mr. Larson relied on Sale #6, a 29-acre property with an existing transmission line easement. In explaining his analysis, Mr. Larson stated:

> [W]hat we are all looking for is what is the market telling us about the market perception of the expansion of VELCO capacity. That's really what we are ultimately trying to discern. Granted that there are significant dissimilarities between sale 6 and the subject. However, there are some very significant similarities. There are very comparable neighborhoods, they have the same views of the Bristol range, the utility easement is about a very comparable distance from the residence, so I thought the information I could gather from this sale would be very instructive in showing us what the market perception is as far as the impact on market value due to the VELCO line expansion.[90]

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[89] Tr. 9/6/06 at 91-92 (Larson).

[90] Tr. 9/6/06 at 91(Larson).

In response to a question from VELCO counsel, Mr. Larson acknowledged that his report did not contain adjustments for the one property he chose:

> Q. Your report though does not include any description of adjustments or differences on – relating to those factors; location, views, market, size of the property, market appeal I think is what you said, size of the property, your report doesn't have a sales grid that kind of compares the Stewart property sale number 6 to the Grice parcel; correct?
>
> A. That's right.[91]

As I explain below, for several reasons I do not find Mr. Larson's testimony to be reliable for determining damages in this case.

First, although his approach requires a comparison of "two sales that are similar" or "as similar as possible," Mr. Larson acknowledges that his Sale #6 and the Grice property have a number of dissimilarities for which he made no adjustments. I note that the most striking difference is that the Grices' property is over ten times larger than the Sale #6 parcel. Here we are certainly not dealing with a housing development and the sale of two similar properties, one with a slightly larger garage than the other.

Second, even if Mr. Larson had made reasonable adjustments for the 29-acre Sale #6 property, his

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[91] Tr. 9/6/06 at 91(Larson).

analysis focuses on only one sale to illustrate an overall trend in a market. This is not compelling. My conclusion is not changed by Mr. Larson's report of a conversation that he had with one of the property owners who, according to Mr. Larson, said "[w]e didn't move to Vermont to look at high tension electrical wires."[92] What would matter, assuming the sales were at all comparable, would be the value derived from an arm's length sale. Regardless of the conversation that Mr. Larson had with the seller, I do not agree that this one sale can be construed as "the market's response."[93]

Furthermore, there is evidence in the record based on Mr. Larson's research that would lend support to a different conclusion. His research of other sales implies that market value is not affected by property owner's views of transmission lines. His research notes brought to light in discovery suggest this. For example, he described a property in Middlebury and wrote to himself that it had a "good view" of a line and an expanded easement area.[94] The record

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[92] Exh. Grice-RRL-1 at 63.

[93] Even if that information were relevant, there may have been other reasons why the property owners sold their property. Since the owners were not cross-examined to determine if there could have been wholly different factors – personal or financial – driving or contributing to their decision to sell the property, the record is not dispositive on this issue.

[94] Exh. Grice-RRL-1 at 27; exh. VELCO-BKS-1 at 25-26; tr. 9/6/06 (Vol. III) at 63, 104-08 (Larson); exh. VELCO Cross 11-12, Richard Larson Deposition Exhibits 3 and 4.

reflects that the property had increased in value by 6.7%.[95] Mr. Larson testified that another property in Brattleboro had a "nice, high, open meadow, with [a] line" in view that runs through the property.[96] The record reflects that two thirty-acre parcels from the property were sold in July 2005 for $250,000 each.[97] In his notes on a thirteen-acre property in Dummerston that he examined, Mr. Larson indicated that the property owner stated that the power line did not "seem to be [a] big effect on price." Also in his notes, Mr. Larson wrote that "no sales show lower price due to [a power line or power line expansion.]"[98]

For these reasons, I find Mr. Larson's analysis does not represent a reasonable determination of the "after" value of the Grices' property.

The Silvers used the Sales Comparison Approach to determine the value of the Grice parcel after the proposed easement expansion. The Silvers could not locate sales that were more comparable in the "after" situation than the sales they collected for the "before" situation. Therefore, they used the same data in the "after" analysis that were used in the "before" analysis.[99]

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[95] Tr. 9/6/06 (Vol. III) at 104-08 (Larson).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Exh. VELCO-BKS-1 at 69.

The Silvers' analysis was based upon the eleven selected sales used to determine the "before" value. The Silvers determined that the subject property had not changed significantly after the easement expansion. After the expansion, the subject property is still improved with the same buildings and land improvements. This is consistent with their highest and best use determination.[100]

The Silvers concluded that there were also no economic changes to the improvements after the acquisition. The only change to the property is the added encumbrance which includes an additional 100-foot-wide transmission line easement, as well as an additional 50-foot-wide construction easement on each side of the proposed transmission easement. Both of these additional easements run parallel and contiguously with the Existing Easement.

According to the Silvers' testimony, the placement of the 345 kV line next to the existing 115 kV line can be expected to decrease the value of the Grices' property for three reasons. First, since the amount of land encumbered by a transmission line would increase by 12.5 acres, the acreage found in tillable and pasture land would necessarily decrease. The record reflects that damages are appropriately

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[100] Exh. VELCO-BKS-1 at 58, 65, 69.

allocated as $5,625 for tillable land lost and $4,843 for pasture land lost.[101]

Second, because the construction easement that allows the easement holder to store equipment and materials within fifty feet of either side of the proposed easement does not specify an end date, VELCO's appraisers valued the easement as though it were a permanent easement. The total acreage affected by this temporary right is 12.5 acres which amounts to $10,468 worth of damages.[102]

Third, the easement would reduce the size of a potential building envelope of a triangular area of land, located on the northeasterly corner of the portion of the subject property, and situated on the westerly side of Halpin Road. Prior to the acquisition, a building could have been built approximately 130 to 150 feet from the existing easement. With the addition of the proposed easement, a building could be built no further than approximately twenty to thirty feet from the proposed easement. As a result, a portion of tillable land would be affected making it no longer appropriate for building due to the building site's envelope's proximity to the transmission line.[103]

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[101] Exh. VELCO-BKS-1 at 69, 76.

[102] Exh. VELCO-BKS-1 at 76.

[103] Exh. VELCO-BKS-1 at 60, 76; tr. 8/29/06 (Vol. II) at 79-80 (Silvers).

The severance damages for these two acres of land are $1,800.[104]

The Department recommended that compensation in the amount of $60,000 be granted. The Department noted that, "Mr. Larsen testified that if the 115 kV line did not exist on the Grice property that it would increase the value of the property by $60,000."[105] Furthermore, according to the Department:

> As the record is devoid of proof that transmission lines substantially decrease property values and is replete with testimony that the most significant impact to the property value is the existing 115 kV transmission line, it is fair to assess the value of the additional transmission line at the level the property owners' own witness testified was the value of the property without the existing line, namely $60,000.[106]

I find no basis in the record for recommending that the Board grant the amount proposed by the Department. The amount of $60,000 was provided by Mr. Larson during his cross-examination by the Department. As the Grices have indicted, Mr. Larson

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[104] Severance damage is the diminution in the value of the remainder land. This damage is not specifically associated with the taking, but is impacted by the taking. Exh. VELCO Cross 1 § B-11 at 49; tr. 8/29/06 (Vol. II) at 95-96 (Silvers).

[105] Department Brief at 19.

[106] *Id.*

performed no appraisal to arrive at this amount, nor is there any evidence in the record to suggest that the value of the existing easement is a suitable proxy for the financial effects of the proposed easement. Furthermore, the Department indicated that it "finds no credible evidence in the record to dispute VELCO's contention that the expanded easement would result in a loss of $25,000 to the Grice's. . . ."[107]

On the basis of the record evidence, I conclude that the value of the Grices' property immediately after the easement expansion would be $775,000. The total amount of just compensation, therefore, is $25,000.[108]

In conclusion, 30 V.S.A. § 112(3), requires compensation to be "based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the value of the remaining property or rights of the owner, and consequential damages."[109] As noted above, I conclude that the before value for the Grices' property as of January 20, 2006, is $800,000, and that the value of the Grices' property immediately after the easement

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[107] *Id.*

[108] VELCO's appraisers round off the total compensation figure to $25,000. *See* exh. VELCO-BKS-1 at 76.

[109] 30 V.S.A. § 112.

expansion would be $775,000.[110] The total amount of just compensation, therefore, is $25,000.

Petition to Join Vermont Transco

On August 17, 2006, VELCO and Vermont Transco LLC ("Vermont Transco") filed a petition with the Board requesting that the Board join Vermont Transco as co-petitioner, jointly and severally, with VELCO in Docket No. 7121.

The Grices oppose the petition on several grounds. First, the Grices maintain that their Motion to Dismiss should apply to Vermont Transco. Second, the Grices argue that "there is no allegation in the Petition, and no evidence offered, that Vermont Transco would meet any of the requirements of 30 V.S.A. §§ 110 et seq., especially § 112". Third, the Grices assert that "there has been no opportunity for discovery, nor any prefiled testimony, to support the new petition."[111]

The Department contends that the petition should be granted. According to the Department, the

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[110] VELCO filed its petition on September 23, 2005, and the Grices' and VELCO's valuation dates were January 19, 2006, and January 20, 2006, respectively. No party has raised this issue, nor is there anything in the record to suggest that the difference of four months is material to the valuation of the Grices' property.

[111] Objection by the Grices to Petition of Transco, dated 8/21/2006.

"formation of Vermont Transco was essentially a financial re-structuring of VELCO intended to provide benefits to the Vermont ratepayers."[112] The Department further argues that Vermont Transco's formation "is utterly irrelevant to any substantive issues pertaining to the condemnation which is the subject of this docket," and is nothing more than "a ministerial exercise brought pursuant to the Board's Order" in Docket 7174.[113]

For the reasons set forth below, I conclude that it is appropriate to join Vt Transco as co-petitioner, jointly and severally, with VELCO in this Docket.

On June 20, 2006, the Board approved a reorganization of VELCO.[114] What was once a corporation, is now, in large part, a limited liability company – Vermont Transco – which owns all VELCO's transmission assets that were formally owned by VELCO.[115] VELCO continues to exist, but its role is

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[112] Brief of the Department of Public Service, September 15, 2006 ("Department Brief") at 4.

[113] *Id.*

[114] Joint Petition of Vt. Elec. Power Co., Inc., Central Vermont Public Service Corp., and Green Mountain Power, Public Service Board, Docket No. 7174, Order of June 20, 2006 ("Vermont Transco Order").

[115] In Docket 7174 the Board agreed to allow VELCO to create Vt. Transco, a new limited liability company, but also that Vt. Transco "would acquire substantially all of VELCO's transmission and related assets, assume most of VELCO's liabilities, and become responsible for the electrical transmission system in

(Continued on following page)

limited to the management of Vt. Transco. In its Order in Docket 7174, the Board found that:

> There will be no material change in the operation, maintenance, supervision and regulation of Vermont's transmission system or the delivery of electric service to Vermonters. Importantly, the proposed transaction would have no impact on either the Public Service Board's (Board") or the Department of Public Service's ("Department") jurisdictional oversight of VELCO or Transco. . . .[116]

The Board determined that VELCO's transfer of its assets to VELCO would be beneficial because, as a "limited liability company, Vermont Transco would not be subject to income taxes on its earnings,"but that, instead, those earnings would be "passed through to Vermont Transco's owners/members."[117]

In Docket 7174, the Board ordered that VELCO should be:

> bound by the conditions and obligations, and entitled to the benefit, of each and every Section 248 certificate heretofore issued by the Board to VELCO, in each case as though Vermont Transco were named therein as a recipient and holder of such certificate . . .

Vermont." *See* Docket 7174, Order of June 20, 2006, at Finding 3.

[116] Vermont Transco Order at 16.

[117] *Id.* at Finding 6.

> The liability of VELCO and Vermont Transco for compliance with the conditions of such certificates shall be joint and several, and by acceptance of this Order without appeal, Vermont Transco irrevocably consents to and accepts the jurisdiction of the Board to enforce each and every such condition against it.[118]

The preceding findings and conclusions from Docket 7174 indicate that the transfer of VELCO's assets from VELCO to Vt. Transco has not materially changed "the operation maintenance, supervision and regulation" of those assets, and that Vt. Transco is now subject to the duties and obligations that formerly were VELCO's alone.

Since, by law, Vt. Transco now stands in what were VELCO's shoes, I reach the same conclusions on the Grices' motion to dismiss with regard to Vt. Transco as the Board reached earlier for VELCO.[119] In their motion to dismiss, the Grices asserted that under 30 V.S.A. § 112, a company seeking a condemnation order from the Board is appropriate only if the property or right the company seeks to condemn will be used to provide service to the public "pursuant to the regulations of the board." With regard to VELCO, the Board concluded that the Grices' argument failed for the following reasons. First, the Board observed that § 112:

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[118] Vermont Transco Order at 16.

[119] Docket 7121, Order of June 23, 2006.

> requires that the condemning company be under an obligation to serve the public and pursuant to regulations of the Board. The most reasonable construction of this requirement is not that the Board has actually adopted regulations that apply to a particular company, rather that the company, by law, is subject to such regulations as the Board may adopt.[120]

Second, the Board wrote:

> even if the Grices' narrow reading of § 112 were correct, VELCO does offer service pursuant to Board regulations. For example, Board Rule 3.600 contains the requirements for the maintenance of utility rights of way. Not only is VELCO subject to this rule, VELCO is, in fact, specifically named in a number of the provisions of Rule. 3.600, such as § 3.631 which requires each utility "including VELCO" to "submit to the Board and the Department a long-term vegetative management plan. . . ." Section 3.622 reads: "Each year the Vermont Electric Power Company, Inc. (VELCO) shall prepare an information sheet. . . ." Section 3.623 states "VELCO shall also prepare newspaper advertising. . . ."[121]

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[120] Docket 7121, Order of June 23, 2006, at 9-10.

[121] *Id.* at 10 (citations to Public Service Board Rule 3.600 omitted).

The Grices also argued that VELCO would not provide services "pursuant to the regulations of the board'" because VELCO's use of the 345 kV line will be exclusively "pursuant to the regulations of" the Federal Energy Regulatory Commission (FERC)."[122] The Board rejected that argument as well:

> 30 V.S.A. § 112(2) says, in pertinent part, that "the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public. . . ." VELCO, as the Hearing Officer indicated, will be providing services to the public. Furthermore, the Hearing Officer explored the shared federal/state jurisdiction under which VELCO operates. Thus, to continue to argue that VELCO's use of the line will be "exclusively 'pursuant to the regulations of' the FERC'," is simply not convincing. One final note, our conclusions are consistent with a decision by the Superior Court for Addison County, issued July 7, 2006, in which the Superior Court ruled upon the Grices' request for declaratory relief regarding VELCO's authority to condemn.[123]

The Board has ruled that Vt. Transco is "bound by the conditions and obligations of each and every Section 248 certificate heretofore issued by the Board to VELCO, in each case as though Vermont Transco

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[122] Grices July 5 Motion at 2.

[123] Docket 7121, Order of June 23, 2006, at 10 (citations omitted).

were named therein as a recipient and holder of such certificate."[124] The Board also found that "there will be no material change in the operation, maintenance, supervision and regulation of Vermont's transmission system or the delivery of electric service to Vermonters," as a result of VELCO's reorganization.[125] Because Vt. Transco is bound by conditions and obligations of each Section 248 certificate issued to VELCO, and because the Board determined that there will be no material change in the operation of Vermont's transmission system, I conclude that the Board's reasons for rejecting the Grices' motion to dismiss VELCO's petition in this case apply equally to Vt. Transco.

The Grices also argue that "there is no allegation in the Petition, and no evidence offered, that Vermont Transco would meet any of the requirements of 30 V.S.A. §§ 110 et seq., especially § 112," and also that "there has been no opportunity for discovery, nor any prefiled testimony, to support the new petition."[126] Both of these arguments lack merit. As discussed above, Vt. Transco now stands in the place of VELCO, and is subject to the same requirements to which VELCO was subject. The Board's Order in Docket 7174 and its findings provide sufficient basis for me

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[124] Vermont Transco Order at 16.

[125] *Id.*

[126] Grices' July 5 Motion at 2.

to conclude that Vt. Transco meets the requirements of 30 V.S.A. §§ 110 et seq., including § 112.

For these reasons, the petition to join Vt. Transco as co-petitioner, jointly and severally, with VELCO in this Docket is hereby granted.

Attorney's Fees

The Grices argue that they are entitled to receive attorney's fees and expert witness co s because the Vermont Constitution and equity require such an award. According to the Grices:

> Necessarily, the Grices were forced to pay counsel to locate, hire and work with their own appraiser, and necessarily they have had to pay their own appraiser, to address the principal element of damages in this case, all on an expedited schedule.[127]

The Grices also argue that they should receive this award because "the taking here was, in effect, an inverse condemnation."[128]

VELCO and the Department disagree and argue that Vermont law prohibits such an award in this case. They contend that Vermont follows what is

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[127] Grices' Proposed Findings and Conclusions of Law at 17.

[128] *Id.* at 20.

referred to as the "American Rule" which requires parties to pay their own attorney's fees.[129]

I conclude, for the following reasons, that it is not appropriate to award attorney fees or expert witness costs in this Docket. In *Monahan v. GMAC Mortgage Corp.*, the Vermont Supreme Court ruled:

> Absent a statutory or contractual provision, we apply the "American Rule" that requires parties to bear their own attorney's fees. We have recognized that courts may invoke their equity powers to deviate from this rule, but "'only in exceptional cases and for dominating reasons of justice.'"[130]

In recognizing this exception, the *Monahan* Court reviewed prior cases which illustrated factual circumstances that would justify a court's invoking its equity powers to award fees. In *In re Gadhue*, a plaintiff was awarded attorney's fees where she had to prosecute a second law suit against a defendant whose actions the Court found "prolonged the litigation by denying plaintiff the fruits of her initial victory."[131] In that case, the Court wrote, a "litigant was compelled to appear twice before the state supreme court to obtain relief that should have been forthcoming after the

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[129] VELCO Reply Brief at 1-2, citing *Monahan v. GMAC Mortgage Corp.*, 2005 VT 110, ¶ 76, 893 A.2d 298.

[130] *Id.* at ¶ 76 (citations omitted).

[131] *In re Gadhue*, 149 Vt. 322, 329, 544 A.2d 1151, 1155 (1987).

first appearance."[132] The Court also noted that the exception applied to the "second round of litigation only, and did not apply to fees incurred during the first full round of litigation stemming from defendant's initial misconduct."[133]

The *Monahan* Court identified *Winey v. Cutler*,[134] as another case that fit within the "narrow limits of the exception delineated in *Gadhue*."[135] In that case, a plaintiff was forced to file a second lawsuit and appeal before receiving satisfaction on a judgment that, the Court wrote, "should have been forthcoming after this Court affirmed the jury award in her initial action."[136] "The plaintiff brought the second lawsuit as trustee process against the sole-proprietorship corporation that employed the judgment debtor" from the first law suit who, in the second action, used "his management powers in his closely-held corporation to manipulate payroll in an attempt to frustrate the plaintiff's attempt to garnish his wages."[137] Under those circumstances, wrote the Court, "equity demanded that the defendant pay all the fees and costs

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[132] *Id.* at 328, 544 A.2d 1154.

[133] *Id.* at 329, 544 A.2d 1155.

[134] 165 Vt. 566, 678 A.2d 1261 (1996) (mem.).

[135] Monahan at ¶ 78.

[136] *Id.*

[137] *Id.*

for the superfluous litigation necessitated by his obstinate refusal to pay the original judgment."[138]

The Vermont Supreme Court has also reversed an order that had awarded attorney's fees based on what the lower court termed a "plaintiff's 'bad faith' in filing suit against defendants despite a contract clause requiring the plaintiff to settle disputes through arbitration."[139] The Vermont Supreme Court explained that it would not invoke the exception to the American Rule because the defendants were not forced into "multiple trips through the state court system," and that there was "no indication that the plaintiff had acted obstinately or obdurately in conducting the litigation."[140]

In this case there is no evidence that VELCO has acted in bad faith or prolonged the litigation. This is also one action; the Grices have not been forced to relitigate an action they have already won. Nor have the Grices won a judgment elsewhere that they are seeking to enforce in this case.

There is also no statutory basis for granting the Grices' request. The condemnation statutes that apply, 30 V.S.A. §§ 110-112, award compensation only for the value of the land taken, impairment to the remaining property, and consequential damages if

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[138] *Id.*

[139] *Id.* at ¶ 79, citing to *DJ Painting, Inc. v. Baraw Enterprises*, 172 Vt. at 246, 776 A.2d 419.

[140] *Id.* at ¶ 79, citing to 247, 776 A.2d 420.

such impairment or damage is proven.[141] These statutes do not authorize an award of attorney or expert fees.

As the Grices' have argued, the condemnation statute for purposes of taking land for state highways provide explicitly for recovery of such fees. 19 V.S.A. § 512(b) states that, under certain circumstances,

> the court shall determine an awared or allow to the plaintiff as part of its judgment such sum as will, in the opinion of the court, reimburse the plaintiff for his or her reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of the proceeding.[142]

The legislature decided not to authorize the award of such fees under 30 V.S.A. § 112. Without a statutory directive or exceptional circumstances, there does not appear to be any basis for granting the Grices' request. *In re Spencer*, a 1989 Vermont Supreme Court case, is instructive here. In that case, permit applicants argued that because one statute – 10 V.S.A. §6086(d) – provides for the automatic issuance of a permit under certain circumstances, a similar statute – 10 V.S.A. § 6086(b) – ought to as well. The Court held that not only does the express language of § 6086(b) not provide for such a remedy,

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[141] *See* 30 V.S.A. §112(3).

[142] 19 V.S.A. § 512(b).

> the fact that § 6086(d) allows for automatic issuance of a permit under certain circumstances illustrates that the Legislature knew how to provide for a remedy if it chose to. The absence of a similar express provision in § 6086(b), therefore, demonstrates a legislative intent not to provide for such a remedy.[143]

Given the absence of a provision in 30 V.S.A. §§ 110-112 for the award of compensation beyond that associated with the value of the land taken, impairment to the remaining property, and consequential damages if such impairment or damage is proven, I reject the Grices' contention that 19 V.S.A. § 512(b) somehow informs the content of the condemnation statutes, i.e., 30 V.S.A. §§ 110-112, under which this investigation is proceeding.

The Grices also argue that they should receive this award because "the taking here was, in effect, an inverse condemnation."[144] The Grices contend that:

> The logic behind 19 V.S.A. § 512(b) appears to be that in regular condemnation proceedings the condemnor submits an appraisal while in inverse condemnation proceedings it is the condemnee's burden to prove his or her case. That logic compels an award here. The taking here was, in effect, an inverse condemnation. The rights as proposed will take

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[143] *In re Spencer*, 152 Vt. 330, 340, 566 A.2d 959, 965 (1989).

[144] *Id.* at 20.

> from the Grices a large number of "sticks" from their bundle of rights for which no compensation was proposed or appraised by the taking entity.

This argument is equally unavailing. Following the Grices' logic would require "backing into" a remedy envisioned by 19 V.S.A. § 512(b) – the condemnation statute that *does not apply* in this case – by assuming that there was no process provided under 30 V.S.A. §§ 110-112 – the condemnation statute *that does apply*.

The Vermont Supreme Court has adopted the following definition of inverse condemnation:

> inverse condemnation "is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power."[145]

This proceeding does not involve the formal exercise of eminent domain, and therefore does not constitute an inverse condemnation. The record in this case is extensive, and includes exhaustive briefing on issues by all parties involved. There has been extensive process in this Docket, and the Grices have had ample opportunity to protect these interests. I

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[145] *Munson v. City of S. Burlington*, 162 Vt. 506; 648 A.2d 867, citing *Martin v. Port of Seattle*, 391 P.2d 540, 542 at note1 (Wash. 1964).

conclude, therefore, that VELCO's proposed taking does not constitute an inverse condemnation, and I hereby deny the Grices' request for attorney and other expert fees.

Finally, in addition to arguing that the circumstances of this case do not justify the award of attorney's fees, VELCO also contends that (1) the Board has no authority to make such an award, (2) no statute specifically or even implicitly authorizes such an award, (3) the Board has no jurisdiction to determine the constitutional validity of 30 V.S.A. §§ 110-112, and (4) whether the Vermont Constitution provides the right to receive attorney's fees or expert witness costs in this action.[146] Given my ruling on the Grices' request, I do not need to consider the merits of VELCO's additional arguments on this issue.

Request to Strike

VELCO has requested that the Board strike finding 18 and the discussion section on page 17 of the Grices' Proposed Findings of Fact.[147] VELCO asserts that the Grices rely on a legal treatise, Nichols on Eminent Domain, for their factual argument that transmission lines significantly affect market value.[148] Because I have not relied upon any of the

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[146] VECLO Reply Brief at 2.

[147] VELCO Reply Brief at 12.

[148] *Id.*

portions of the Grices' brief cited by VELCO, I hereby deny the request.

V. Conclusion

In conclusion, I recommend that the Board authorize, as conditioned here, the condemnation, for a power line easement, of certain property described in the findings above, and owned by the Grices. For all the reasons set out above, and on the basis of the record evidence, I conclude that the "before" value for the Grices' property as of January 20, 2006, is $800,000, and that the value of the Grices' property immediately after the easement expansion would be $775,000. The total amount of just compensation, therefore, is $25,000.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 29th day of November, 2006.

s/David Farnsworth
David Farnsworth
Hearing Officer

VI. Board Discussion

On November 21, 2006, VELCO filed a request for oral argument in this Docket. In that filing VELCO also requested that the Board issue its ruling

from the bench. We declined to do so. On November 22, 2006, the Grices filed a request for oral argument. On November 28, 2006, the Grices filed Exceptions to the Hearing Officer's Proposed Findings and Conclusions, ("Grices' Exceptions") and also a Motion to Reopen Evidentiary Hearing ("Grices' Motion"). On November 28, 2006, VELCO filed Comments on the Hearing Officer's Proposal for Decision ("VELCO's Comments").[149]

On November 29, 2006, we heard oral argument from the Grices, VELCO and the Department concerning the Proposal for Decision ("PFD") issued by the Hearing Officer. We have also carefully examined the comments upon the PFD submitted by the Grices and VELCO, including the Grices' Motion to Reopen Evidentiary Hearing. We first consider the Grices' exceptions, and then those submitted by VELCO.

The Grices' Comments

The Grices' first exception concerns the Hearing Officer's necessity findings.[150] Specifically, they question the Hearing Officer's reliance in Finding 16 upon

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[149] "VELCO Comments."

[150] For purposes of condemnation under § 112, the Hearing Officer, in his Order of June 23, 2006, concluded that "Vermont law is clear that a determination of 'need' in a § 248 proceeding, and the determination of 'necessity' in a condemnation case under §§110-112 are materially different inquiries." Order of June 23, 2006, at 20. We upheld his determination in our Order of July 21, 2006, at 3-12.

what the Grices characterize as "the Board's earlier findings about underground burial, in Docket 6860."[151] The Grices contend that the PFD fails to take into consideration the Grices' proposed finding which addresses conclusions reached by the Connecticut Siting Council regarding reliability of buried 345 kV lines.[152]

While the Grices are correct, in part, as to the source of the Hearing Officer's reliability findings, the Grices do not recognize that the Hearing Officer relies on more testimony than the Docket 6860 findings submitted by VELCO. He relies upon testimony from Department witness, Litkovitz,[153] and VELCO

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[151] Grices' Exceptions at 1. Finding 16 reads as follows:

> The Board has also found that "the extensive installation of underground cable for higher voltage (345 kV) transmission lines introduces new operating and reliability concerns, including issues related to capacitance and harmonics that are difficult to resolve." Docket 6860, Order of January 28, 2006, at Finding 544. *Id.*

[152] *Id.* In his review, the Hearing Officer concluded that there is a significant distinction between the "need" which is reviewed in a case brought under 30 V.S.A. § 248 and the "necessity" considered in a §§110-112 condemnation case, and therefore, that since the Grices had not participated in Docket 6860 that it would not be appropriate to take judicial notice of materials from that investigation.

[153] *See* Finding 15, "An alternative to VELCO's proposal, the use of underground cable for portions of the proposed West Rutland to New Haven 345 kV line, would have a significant potential to adversely affect system stability and reliability. Litkovitz pf. at 2."

witness, LaForest.[154] In articulating his necessity determination, the Hearing Officer does not rely solely on the consideration of reliability. He also considers testimony on cost and feasibility,[155] and concludes that "placing the line underground would pose a threat to system reliability and stability, would be especially costly, and would require relatively large, fenced transition stations at either end of the buried line."[156] While the Grices' proposed finding recognizes that undergrounding 345 kV cable is a possibility that does not necessarily result in a reliability problem, the Hearing Officer has provided ample basis for his conclusions that burying the line at issue in this case could have significant negative results, including a threat to system reliability. For these reasons, we deny the Grices' request to include further findings on this issue.

The Grices also argue that the PFD's necessity determination fails to take into consideration requirements that Act 61 places upon VELCO.[157] According to

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[154] Finding 17, "When underground cables fail, they are typically out of service for long periods of time. LaForest pf. at 6."

[155] *See* Findings18 (cost) and 19 (possible effects on wetlands).

[156] PFD at 17.

[157] In his Order of June 23, 2006, at 29, the Hearing Officer wrote:

> Act 61 establishes the requirement that Vermont, in its regional negotiations, seek regional financial support for reliability-related projects. As part of this

(Continued on following page)

the Grices, Act 61 "should be read *in pari materia* with § 112," and the "'necessity' that must be shown for this project can be proven only by showing that VELCO has first sought funding for the nontransmission alternatives."[158]

For reasons set out below, we disagree. In our July 31, 2006, Order we concluded that the cost-effectiveness of the transmission line is a § 248 issue that was considered in Docket 6860 and has nothing to do with this condemnation. Thus Act 61's requirements concern non-transmission alternatives that appear to have no application to the current condemnation proceeding, and the Grices have presented no basis for us to conclude otherwise. Without such a connection between Act 61 and this condemnation, we conclude that there is no basis for granting the

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state-wide effort, subsection (6) of Act 61 requires Vermont transmission companies to:

> advocate for regional cost support for the least cost solution with equal consideration and treatment of all available resources, including transmission, strategic distributed generation, targeted energy efficiency, and demand response resources on a total cost basis.

The Grices' questions seek information regarding the degree to which the NRP and the portion of the NRP that may cross the Grices' land is a "reliability-related project" under Act 61, the amount of support that VELCO has received for the project, and the amount of support that alternatives for this project have received. *Id.*

[158] Grices' Exceptions at 3.

Grices' request here. We, therefore, conclude that there is no reason to change the Hearing Officer's PFD with regard to his necessity findings and conclusions.

Findings on Property Rights Subject to Condemnation

The second category of the Grices' exceptions concerns the Hearing Officer's conclusions with regard to certain property rights subject to condemnation. The Grices object to Finding 41, arguing that Mr. Wright's prefiled testimony, "says nothing in support of this conclusion." Finding 41 states that the "right and ability to enter the property at any time to remove danger trees during an emergency or during routine maintenance are critical to maintaining the reliability of the VELCO system. Requiring exact trimming rights is not practical."[159] The Grices contend that this finding addresses an issue that was "the subject of extensive briefing and substantial evidence, but reflects neither," and "paraphrases Mr. Wright's conclusion."[160] According to the Grices, this does not suffice under 3 V.S.A. § 812(a) and the common law on findings.

We disagree. Taken together, findings 41 through 46 make clear that flexibility in its ability to repair and monitor the line is very important to VELCO.

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[159] Wright pf. at 3, 6.

[160] Grices' Exceptions at 3.

Mr. Wright's unrebutted testimony leads to the same conclusion. VELCO made available Mr. Wright, as their witness to testify on the property rights associated with access, vegetation management, anchor and guy placement, and on the revisions to the proposed easement deed that VELCO submitted.[161] Mr. Wright presented direct testimony and was cross-examined by the Grice's counsel. Mr. Wright is the person at VELCO responsible for the "maintenance of lines, substations, rights of way, facilities and the VELCO safety program," and was provided by VELCO as their expert on these matters.[162] Specifically, Mr. Wright testified as to the importance of being able to remove trees during an emergency and during routine maintenance, the need to stay in compliance with appropriate vegetation management practices, the need to possibly place additional anchors and to work with property owners in this process, and finally the need to be able to enter upon and cross property owned by the Grices to complete this work.[163] The Grices provided no witness to rebut this testimony.

The Grices also argue that Finding 44 "states that 'it is possible' that placement of anchors and guy wires outside of the right of way may be needed," and that this is "an incomplete quote from Mr. Wright's

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[161] This is discussed below in the context of the Grices' Motion to Reopen Evidentiary Hearing, November 28, 2006.

[162] Wright pf. at 1.

[163] *See* Findings 41-46.

testimony."[164] According to the Grices, "Mr. Wright added that this need, if it ever arises, would not arise in an emergency situation," and by "omitting this important fact, the findings tend to lend support to a finding of 'necessity' where in fact Mr. Wright's testimony was that there is no necessity for condemnation at this time."[165]

We conclude that VELCO's ability to place an anchor at some time is necessary to VELCO's ability to provide adequate service. We reach that conclusion whether or not the circumstances under which such an anchor would be placed rise to the level of emergency. The requirement of section 112 is that the property right to be condemned is necessary, and is not restricted to the rights that are necessary only for responding to emergency situations. VELCO has demonstrated that it needs this flexibility in order to provide adequate service, and the Hearing Officer found that this is reasonable. We see no basis for determining otherwise. In summary, we conclude that the Hearing Officer appropriately relied upon Mr. Wright's testimony in reaching his decision as to appropriate specificity in characterizing these property rights.

In their exceptions and in their Motion to Reopen Evidentiary Hearings, the Grices have also argued that the Hearing Officer, without notice, changed his

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[164] Grices' Exceptions at 4.

[165] *Id.* citing Wright pf. at 4.

pretrial ruling on the right of access, thereby departing from Vermont law and denying procedural due process. The Grices argue that the Hearing Officer, in a pretrial ruling, concluded that:

> the Vermont precedent, *VELCO v. Anderson*, 121 Vt. 72 (1972), holds that VELCO's claimed points of access must be specified, unless the landowner fails to object to the lack of specificity. The Grices objected. The Hearing Officer concluded "VELCO, therefore, needs to articulate precisely where it proposes access points to the easement."[166]

The Grices maintained that they "prepared for hearing on the basis of the Hearing Officer's order. They cross-examined Mr. Wright primarily on the basis of the Hearing Officer's ruling, to show that VELCO had not complied with the ruling."[167] They also contend that:

> [w]ithout warning, the Hearing Officer has now changed his ruling and has approved of unspecified rights of access. His ruling does not acknowledge that he is departing from his pretrial ruling. His ruling does not explain what was deficient in his pretrial reasoning. His ruling neither accepts nor rejects the proposed finding. Instead, PFD findings 47-52 rely on the conclusory testimony of a nonlawyer to, in effect, overrule both his own

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[166] Grices' Motion at 1-2 (citations omitted).

[167] *Id.* at 2-3.

> pretrial ruling and the precedent set by the Vermont Supreme Court in Anderson.[168]

Furthermore, they argue that "it is particularly unfair for this matter to go forward on the basis of an unspecified, and uncompensated rights of access where the Hearing Officer's pretrial ruling unambiguously directed VELCO to specify its points of access, and it was not until after the evidence was closed, in his PFD, that the Hearing Officer retracted his earlier ruling."[169] Finally, the Grices contend that:

> The Hearing Officer's ruling was the "law of the case" and it is "a violation of the 'law of the case' doctrine, procedural due process and the Administrative Procedure Act,

3 V.S.A. § 809(c), to allow the pretrial ruling to be changed, without prior notice to the Grices to allow them to respond to the change before the evidence was closed.[170]

For the following reasons, we disagree with the Grices' characterization of the Hearing Officer's treatment of this issue. It is clear to us that, prior to the issuance of the PFD, the question of the appropriate specificity for characterizing property rights subject to condemnation was not settled, and that the

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[168] *Id.*

[169] Grices' Exceptions at 8.

[170] *Id.*

Grices had no reasonable basis for assuming that it was.

In his June 23, 2006, Order, the Hearing Officer recognized that the language of VELCO's proposed easement deed is excessively vague, and wrote:

> *VELCO is hereby directed to amend its prefiled testimony* to provide a sufficiently detailed description of the property rights that VELCO is seeking to condemn. This includes greater precision with regard to access, tree and other vegetation removal, and guy wires and anchors. *If, in its review of the proposed easement, VELCO sees room to provide additional precision, I encourage VELCO to take this opportunity to make those changes.*[171]

A month later, in a subsequent procedural order, the Hearing Officer ruled on the Grices' request that he issue a further Order regarding the need for specificity. The Hearing Officer wrote:

> On July 17, 2006, VELCO submitted prefiled testimony of Jeffrey Wright along with one exhibit, Mr. Wright's resume. On July 24, 2006, the Grices filed a letter in which they object to the prefiled testimony and exhibit, and request "an order of the Hearing Officer that VELCO comply with the Hearing Officer's ruling dated June 26, 2006, pertaining to specification of the property rights to be taken." Specifically, the Grices maintain that

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[171] Order of June 23, 2006, at 15 (emphasis added).

> Mr. Wright's testimony and VELCO's revised deed, discussed above, fail to comply with the Order of June 23, 2006.[172]

The Hearing Officer further noted:

> As to the metes and bounds description for danger-tree removal and access, Mr. Wright's prefiled testimony purports to address these issues. While, I do not conclude that it would be beneficial to have this testimony stricken, the Grices' concerns are, at the same time, significant. As the Grices have indicated, a failure to specify implies that the "entire 300 acre parcel is at risk."[173]

The Hearing Officer declined to grant the Grices' request to issue an order requiring VELCO to comply with the Order of June 23, 2006, and instead, indicated that, "at this point, since VELCO, through its witness, Mr. Wright, appears to take the position that greater specificity in an easement deed would not be desirable, we shall wait and consider this question, too, at technical hearings."[174]

Thus, the Grices are not correct in stating that the:

> Hearing Officer's pretrial ruling unambiguously directed VELCO to specify its points of access, and it was not until after the

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[172] Order of July 31, 2006, at 7 (citations omitted).

[173] *Id.* at 10.

[174] *Id.* at 10.

> evidence was closed, in his PFD, that the Hearing Officer retracted his earlier ruling.[175]

None of this can be considered an "unambiguous" ruling on the ultimate issue, nor can it be considered the "law of the case." The Grices had clear notice that the issue of the specificity of these rights was not settled and that it would be the [sic] explored during technical hearings.

The Grices further argue that it is a:

> denial of due process and of the right to compensation under Article 2 of Chapter 1 of the Vermont Constitution, and in violation of 30 V.S.A. §§ 11-112 and 3 V.S.A. §§ 809 and 810, for VELCO to submit and for the Board to accept that damages should be awarded solely for the rights taken within the easement strip, while awarding to VELCO the rights outside the easement strip to take danger trees, install anchors and guy wires, and have access across the remaining 300 acres with zero compensation for these additional takings.[176]

This is incorrect. The Grices had notice that the issue of the specificity of rights subject to condemnation remained to be determined, and VELCO provided supplemental prefiled testimony on the issue prior to hearing. While the Hearing Officer did not

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[175] Grices' Exception at 8.

[176] Grice Exceptions at 17.

make a finding that VELCO's appraiser had considered these rights, the record includes the following statements made on redirect by one of VELCO's appraisers, Mr. Brian Silver:

> Q. Mr. Dumont asked you about, I won't use the word impact, the remainder of the property, and severance damages?
>
> A. Yes.
>
> Q. And you spoke about the portion of the property, the northwest portion of the property, in terms of severance damages; correct?
>
> A. Correct.
>
> Q. There is also – setting those damages aside, there is also other property rights that VELCO is proposing to take here; correct?
>
> A. Yes.
>
> Q. You talked about right of access in your testimony; correct?
>
> A. Yes.
>
> Q. And you placed some value on that, but not a substantial value, did I understand your testimony?
>
> A. That's correct.
>
> Q. Also in your report, at page 62, you make reference to the easement language and the fact that there is a right here to place anchors outside of the – outside of the right-of-way; correct?

A. Yes.

Q. And that was part of your analysis as well; correct?

A. Yes.

Q. Did you – do you feel that the right to place anchors outside the right-of-way in the context of your overall appraisal has significant value?

A. No.

Q. Would it be fair to describe it as de minimis value?

A. It is de minimis, and furthermore, it's included within the reduction in value that I've included.

Q. Same with the proposed easement has a reference to cutting danger trees and shrubs outside the right-of-way; correct?

A. Yes.

Q. And was that part of your appraisal as well?

A. Yes.

Q. Would you explain that as well please?

A. Well I certainly considered the fact that that could happen. That there could be trees that needed to be removed. I did not specifically go out and value each tree or how much that particular right would damage the

> property. That's included in my reduction in value due to the existence of the easement.
>
> Q. I understand you didn't put a particular dollar, but in part you didn't put a particular dollar because it's a small amount in your view?
>
> A. Absolutely.[177]

Given that both parties had notice of the question of appropriate specificity of the rights subject to condemnation that this issue would be addressed at hearings, and inclusion of these damages upon which the Hearing Officer relied in his award of damages in VELCO's appraisal upon which the Hearing Officer relied in his award of damages, we conclude that the Grices' argument is unsupported. The PFD fairly awards them damages.

In addition, the Grices contend that:

> The PFD's discussion of the rights taken also includes some erroneous language about fiber optic cables, on page 27. The language is unnecessary to the decision. It is objected to and should be stricken. It states that under the existing deed for the 115 kV line, "VELCO may be able to install" fiber optic cables with excess capacity. This issue was never briefed and was not part of this case. If the Board believes this issue is relevant, the Grices refer the Board to *Corley v. Entergy*

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[177] Tr. 9/6/06 at 99-101 (Brian Silver).

> *Corp.*, 246 F.Supp. 565 (D. Texas 2003) and ask for permission to fully brief this issue by supplement.[178]

In his discussion of the appropriateness of VELCO's request to install telecommunications facilities in the easement they seek to condemn here, the Hearing Officer noted that VELCO had two alternative possibilities to install the amount of capacity it seeks to place across the Grices' land. The first, observed the Hearing Officer, would be to "negotiate with the Grices for the use of their property."[179] The Hearing Officer made a second observation:

> Secondly, it would appear from the broadly-worded easement deed associated with the existing 115 kV right-of-way that VELCO may be able to install communications cable with excess capacity across its existing easement, avoiding altogether the issue of condemnation for this purpose.[180]

The Grices objections here are without merit inasmuch as the Hearing Officer explored this issue at some length with VELCO's telecommunications witness, and made these observations as possible solutions to part of the dispute brought before the Board.[181] The transcript reflects that VELCO's witness did not

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[178] Grice Exceptions at 5.

[179] PFD at 27.

[180] *Id.*

[181] *See* tr. 8/29/06 at 148-150 (Nelson).

think that the use of the existing easement would be suitable.[182] The transcript also shows that the Grices' counsel was in the hearing room during this exchange, and did not object and took advantage of the Hearing Officers' offer to ask further questions of the witness on issues that the Hearing Officer had raised in his questioning of VELCO's witness on this matter.[183] The Grices have not been disadvantaged by the PFD language they cite to in this regard, nor is there any need for it to be removed from the PFD.

In conclusion on this issue, the record is clear that the Hearing Officer recognized the lack of specificity in the initial description of the property rights that VELCO was seeking to acquire. It is equally clear that VELCO was resistant to providing the requested specificity, in order to retain flexibility to access and undertake certain activities on the Grices' property. The Hearing Officer's procedural Orders required VELCO to present testimony further specifying the property rights, and the Grices the opportunity to cross-examine on this issue. Thus, for the reasons more fully set forth above, we adopt the Hearing Officer's findings, recommendations, and conclusions regarding the specificity of the rights that VELCO is seeking.

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[182] *Id.*

[183] *See* tr. 8/29/06 at 152-154 (Nelson).

The Grices' next exception concerns what they describe as the failure to find damages to the remainder interest, i.e., severance damages. Specifically, they object to there being no corresponding damages discussion associated with Finding 68, which reads as follows:

> The impact to the public "view from the road" of the easterly route has to be balanced with the benefits that would accrue to the Grices from the proposed relocation. When this tradeoff is weighed, the easterly alternative would result in more adverse aesthetic impact to the public as a whole.[184]

According to the Grices, the finding "is not reflected in the findings and conclusions on damages," which "fail to find any damages to the remainder interest." This is not correct. The Hearing Officer fully discusses the damages testimony, including severance damages. The Grices' appraiser, Mr. Larson, valued the taking due to the easement expansion at $416,850. Not finding this reasonable, for various reasons which he discusses from pages 33-48, the Hearing Officer rejected Mr. Larson's testimony.

The Hearing Officer discussed what he considered to be a reasonable estimate of damages at pages 46-47 of the PFD. He concluded that "the placement of the 345 kV line next to the existing 115 kV line can be expected to decrease the value of the Grices'

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[184] PFD Finding 68 (citations omitted).

property for three reasons."[185] He found, first, that acreage currently in tillable and pasture land would necessarily decrease, second, that there would be 12.5 acres affected by the temporary right allowing the easement holder to store equipment and materials within fifty feet of either side of the proposed easement, and third, that there would be severance damage because the easement would reduce the size of a potential building envelope of a triangular area of land, located on the northeasterly corner of the portion of the subject property. There is not, as the Grices have argued, a failure to find damages to the remainder interest of the Grices' land.

For these reasons we reject the Grices' arguments and uphold the Hearing Officer's determination on this issue.

The Grices' next exception concerns what the Grices characterize as the absence of a finding accepting, rejecting or addressing the expert testimony submitted by the Grices' appraiser, Mr. Larson, on the subject of "present value."[186]

In his discussion of this topic, which the appraisers referred to as "Before" value, the Hearing Officer recognizes that "Before" value is determined by different valuation methodologies undertaken by both

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[185] *Id.* at 46.

[186] Grices' Exception at 18.

parties' appraisers.[187] He also recognizes that these methodologies rely, in part, upon the sampling of comparable sales. In reviewing the appraisers' use of comparable sales, the Hearing Officer stated that "Mr. Larson's weighting and adjustments to the value of the properties he has chosen are inappropriate," and that Mr. Larson's analysis is "uninformative due to the discrepancy between the size of the parcels upon which his analyses are based and the size of the Grices' property."[188] In comparing Mr. Larson's analyses to the work submitted by VELCO's appraisers, the Hearing Officer further states:

> While VELCO's appraisers also choose certain sales that do not appear to be "comparable" to the Grices' property, these sales do not comprise as significant a portion of their overall collection of comparable samples, and thus their analysis presents a more reliable assessment of the value of the Grices' property.[189]

In making his findings on these issues, the Hearing Officer chose to rely upon VELCO's appraisers. The absence of findings drawn from Mr. Larson's testimony reflect the lack of reliability of that testimony. Mr. Larson's testimony is, however thoroughly

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[187] Both parties' appraisers used the Sales Comparison approach. In addition, the Grices' appraiser used the Cost Comparison approach.

[188] PFD at 35.

[189] *Id.*

discussed, and that discussion includes the reasons why Mr. Larson's valuation was not compelling, and thus not adopted by the Hearing Officer.[190]

The Grices also argue that the "Before" evaluation provided by VELCO's appraisers was flawed. The Grices resubmit 20 of their proposed findings in support of their position. We note that part of these resubmitted findings include findings regarding the "highest and best use" of the Grices' property. The Hearing Officer found that, while the appraisers did not agree in their valuations, both parties' appraisers agreed on the highest and best use of the Grices' property.[191] We conclude that the Hearing Officer's findings and conclusions on this matter are reasonable and well-supported. We see no reason to modify his findings or conclusions here.

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[190] *See* PFD at 35-39.

[191] *See* PFD at notes 60-62 and accompanying text:

> VELCO's appraisers made a determination that the highest and best use of the unimproved and improved subject property before the proposed easement did not differ greatly: the unimproved highest and best use is for agricultural use with very limited residential development, while the improved use is for agricultural use and rural residential with secondary residences and additional acreage. This determination is essentially the same as that of the Grices' appraiser who concluded that the highest and best use is a gentleman's farm or an agricultural/residential property with excess acreage.

Id.

The Grices maintain that "there was extensive testimony and cross-examination on the impact of the proposed easement on the remainder of the Grice lands."[192] They maintain, however, that Finding 93 is the only discussion, and that this "finding does nothing more than adopt, verbatim, without explaining why, the conclusion of the VELCO appaisers, set forth at 8/29/06 Tr.p.72, line 12."[193] In their exception to the PFD, the Grices rely on the 1967 case of *Krupp v. Krupp*, suggesting that the Hearing Officer did not independently consider the evidence.[194]

We disagree. Finding 93 encapsulates, in large part, the testimony from several sources on this question that the Hearing Officer found to be reasonable and helpful. It states:

> After the proposed easement expansion, the property would contain the same improvements as found on the property in the "before" situation, and the property would remain the same, but for the widened portion of the easement. Because the easement expansion would have minimal impact on the property, the overall utility of the property would change only minimally. Thus, the highest and best uses of the property before and after the easement expansion are the

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[192] Grices' Exception at 21.

[193] *Id.*

[194] *Krupp v. Krupp*, 126 Vt. 511 (1967).

> same. Exh. VELCO-BKS-1 at 65-66; tr. 9/6/06 (Vol. III) at 51(Silver).[195]

Rather than a verbatim adoption of VELCO's appraisers' live testimony, as the Grices have said, this finding is based, in part, upon the appraisal report (Exh. VELCO-BKS-1) submitted by VELCO's appraisers. In the discussion of the highest and best use of the Grices' property after the placement of the proposed easement, the report states that, "the subject property remains the same as previously described in the analysis of the total property prior to the easement."[196]

We find the Grices' reliance on *Krupp* to be inapposite here. First, we note that *Krupp* and related cases concern a decision as a whole, while here we are considering one finding.

In *Krupp*, the Vermont Supreme Court held that a trial judge bears the duty:

> to sift the evidence and state the facts. . . . [When a trial court adopts one party's proposed findings with little modification,] it is in danger of being charged with overlooking the proper performance of its judicial function, and such practice is to be avoided, as

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[195] PFD at Finding 93.

[196] *See* exh. VELCO-BKS-1 at 65.

> should any procedure that suggests a failure to exercise independent judgment.[197]

However, in more recent cases, the Vermont Supreme Court has treated *Krupp* as excessively formalistic, and has explicitly declined to apply Krupp's standard automatically.[198] For example, in *Bonanno v. Bonanno*, the Court explained that:

> [t]he mere fact that a court's findings closely parallel the requested findings of one or both parties does not overcome the presumption that the court exercised independent judgment in weighing the evidence and making its findings, if the findings are supported by the evidence.[199]

Therefore, it is not error for a tribunal to adopt one party's requested findings, so long as the tribunal has fulfilled its duty to exercise independent judgment which (the Court has further held) is to be presumed.

In the current case, the Hearing Officer reviewed extensive testimony. It appears that he rejected, in large part, the testimony provided by Mr. Larson, and then made his finding based upon the written report supplied by VELCO's appraisers and upon their oral

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[197] *Krupp*, 126 Vt. at 513 (citations omitted).

[198] *See* Dockets 6117, 6118, and 6119, Order of May 3, 1999; Docket 5330-A, Order of May 21, 1992.

[199] *Bonanno v. Bonanno*, 148 Vt. 248, 250 (1985).

testimony.[200] In his PFD, which contains a thorough review of the record, and the parties' other filings, the Hearing Officer has found the testimony provided by VELCO's appraisers to be reasonable. We conclude on the basis of the record in this case that the Grices' have not overcome the presumption that the Hearing Officer has exercised independent judgment. Accordingly, we reject the Grices' arguments and conclude that the Hearing Officer's findings are sound.[201]

The Grices' next take exception to certain of the Hearing Officer's findings and conclusions regarding Vermont Transco LLC ("Vt. Transco"). They ask that the Vt. Transco rights be denied for the following reasons. First, the Grices assert that the PFD contains no findings or discussion of any evidence supporting the request, and in fact, none was submitted. Second, the PFD inappropriately relies on the rulings in Docket 7174 in concluding that "Transco now stands in the place of VELCO, and is subject to the

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[200] *See* PFD at 35-36 (general discussion of both parties' appraisers' sampling, weighting and valuation methodologies); 37 (Larson sales comparison approach), 38-39(Larson weighting and adjustments); 40-41(reasonableness of sample sizes); 41-42 (Larson cost approach); 43-44 (Larson paired-data "after" valuation); 44-45 (Larson sample and adjustments; 45 (other Larson evidence); 48 (conclusions).

[201] The Grices do bring to light a citation error in Finding 93. The correct transcript citation is the one to which the Grices point, *i.e.*, tr. 8/29/06 at 71-72 (Brian Silver) and not the 9/6/06 citation set forth in the finding. We hereby modify Finding 93 to correct this citation error.

same requirements to which VELCO was subject."[202] Furthermore, according to the Grices, "[i]f it is true that Transco stands in VELCO's shoes, as a matter of law, in all proceedings, then the request filed in this case was surplusage."[203] However, they argue that if "any action is needed from this Board in this case, then prefiled testimony, evidence and the right of cross-examination needed to be provided."[204]

The Hearing Officer addressed these arguments in the PFD at pages 48-52. He noted, among other things that:

> On June 20, 2006, the Board approved a reorganization of VELCO. What was once a corporation, is now, in large part, a limited liability company – Vermont Transco – which owns all VELCO's transmission assets that were formally owned by VELCO. VELCO continues to exist, but its role is limited to the management of Vt. Transco. In its Order in Docket 7174, the Board found that:
>
> > There will be no material change in the operation, maintenance, supervision and regulation of Vermont's transmission system or the delivery of electric service to Vermonters. Importantly, the proposed transaction would have no impact on either the Public Service Board's (Board") or the Department of Public

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[202] Grices' Exceptions at 33 citing PFD at 52.

[203] *Id.*

[204] *Id.*

> Service's ("Department") jurisdictional oversight of VELCO or Transco. . . .[205]

He also recognized that:

> The Board also found that "there will be no material change in the operation, maintenance, supervision and regulation of Vermont's transmission system or the delivery of electric service to Vermonters," as a result of VELCO's reorganization.[206] Because Vt. Transco is bound by conditions and obligations of each Section 248 certificate issued to VELCO, and because the Board determined that there will be no material change in the operation of Vermont's transmission system, I conclude that the Board's reasons for rejecting the Grices' motion to dismiss VELCO's petition in this case apply equally to Vt. Transco.[207]

The Hearing Officer concluded that "Vt. Transco now stands in the place of VELCO, and is subject to the same requirements to which VELCO was subject. The Board's Order in Docket 7174 and its findings provide sufficient basis for me to conclude that Vt. Transco meets the requirements of 30 V.S.A. §§ 110 et seq., including § 112."[208]

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[205] PFD at 50 (citations omitted).

[206] *Id.*

[207] *Id.* at 52.

[208] *Id.*

We concur in the Hearing Officer's analysis. In fact, given that Vt. Transco is, in large part, an entity resulting from a restructuring of VELCO, we do not consider that this was actually the introduction of a new party in this Docket. We thus uphold the Hearing Officer's decision to allow Vt. Transco to join as a co-petitioner in this case.

The Grices have submitted additional legal issues that have been considered both in the PFD and in earlier Hearing Officer Procedural Orders. Counsel for the Grices indicated that:

> These arguments repeat much of what has been briefed to the Board previously. Citation to the facts in the record has been added. Counsel apologizes for the repetition; however, to avoid any claim of waiver, these arguments are set forth in full.[209]

The Hearing Officer addressed these arguments, in part, in the PFD at pages 48-52 and in his Order of June 23, 2006. Citations to the discussions are included below. The Grices' arguments include:

> VELCO Will Not Use the 345 kV Line to Provide Transmission Service "Pursuant to the Regulations of the Board;" VELCO's 345 kV Transmission Services Are Regulated Solely by FERC.[210]

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[209] Grice Exceptions at 34, note 6.

[210] The Hearing Officer addressed this issue in his Order of 6/23/06 at 5-10, and concluded that VELCO's activities are subject to shared jurisdiction between the Board and the

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Alternatively, VELCO Cannot Exercise Eminent Domain Because It Has No "Obligation to Serve the Public on Reasonable Terms."[211]

The Hearing Officer's prior order misunderstood the Grices' argument and wrongly relied on Board Rule 3.600 to hold that Board regulations govern VELCO's services; the Hearing Officer's rationale is contradicted by FERC-filed Tariffs and FERC law.[212]

The Applicability of Article 2 Chapter 1 of the Vermont Constitution.[213]

Federal Energy Regulatory Commission. We also discussed the issue in our Order of July 21, 2006. In that Order we agreed with the Hearing Officer's jurisdictional assessment. *See* Order of July 21, 2006, at 13-14. Citing *Harley Grice et al. v. Vermont Electric Power Company*, Docket No. 22-1-06 AnCV, July 7, 2006, we also noted that "our conclusions are consistent with a decision by the Superior Court for Addison County, issued July 7, 2006, in which the Superior Court ruled upon the Grices' request for declaratory relief regarding VELCO's authority to condemn." *See id.* at 14.

[211] In our Order of July 21, 2006, we recognized that, in the Hearing Officer's June 23, 2006, Order at 7, he had determined that VELCO will be providing services to the public:

> [I]n addition to being required to provide access to the public through its open-access transmission tariff, VELCO's recent proposed transmission upgrade also received a certificate of public good.

See also generally Order of June 23, 2006, at 5-10.

[212] *Id.*

[213] *See also* Order of June 23, 2006, at 7 in which the Hearing Officer reached the following conclusions. Section 112 requires that "the condemnation of such property or right is

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For the reasons set out in the Hearing Officer's PFD, and the other Orders in this Docket, we agree with the Hearing Officer's determinations. We, therefore, reject the Grices' arguments on these issues.

In this Docket, the Grices also argue that they are entitled to receive attorney's fees and expert witness costs because they claim the Vermont Constitution and equity require such an award. The Grices contend "that in every Vermont condemnation case the Vermont Constitution requires an award of reasonable attorneys fees and expert witness costs under the Common Benefit clause of Article 7 of Chapter 1

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necessary in order that the petitioner may render adequate service to the public." 30 V.S.A. § 112(2). While the Board does not have the authority to determine the constitutionality of a statute, it can interpret statutes in light of the Constitution. *See Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357 (1988). The condemnation being proposed here must be resolved in accordance with the requirements of § 112, and thus will consider "adequate service to the public," the "necessity" of a taking, and the award of "an equivalent in money," consistent with the requirements articulated in Article II of the Vermont Constitution. Section 112 would appear to provide for a greater grant of remuneration than required by the "equivalent of money" standard in the Vermont Constitution:

> That compensation shall be based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the value of remaining property or rights of the owner, and consequential damages including but not limited to the damage to the owner's business.

30 V.S.A. § 112. *Id.*

of the Constitution of Vermont, and Articles 9 and 4."[214] The Grices state that "the Hearing Officer was asked to award reasonable attorneys fees and costs under Articles 4, 7 and 9 as part of their final order in this matter," that "the Hearing Officer's PFD did not address this request," and that "the Board now is asked to do so."[215] We find these constitutional arguments unavailing, for the following reasons.

With respect to Article 7, the Grices do not provide any explanation of how failure to award attorney fees and expert witness costs would violate that article, and we see no basis for finding such violation.

Article 9, meanwhile, only applies to the apportionment of taxes, *USGEN New England, Inc.*, 2003 VT 102, ¶ 15, 176 Vt. 104, 838 A.2d 927 (2003); *In re Hickok's Estate*, 78 Vt. 259, 62 A. 724 (1906). Article 9 thus has no bearing here.

Finally, Article 4 guarantees access to the courts; the Grices have access to the courts if they wish to appeal the Board's decision in this proceeding. There is nothing in the language of Article 4 that would alter Vermont's adherence to the American Rule for the award of attorney fees, nor have the Grices identified any precedent or other provision of law to support such a deviation.

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[214] Grices' Exceptions at 50-51.

[215] Grices' Exceptions at 52.

In addition to these constitutional arguments, citing *In re Appeal of Gadhue*, the Grices have asked that the Board use its equitable powers of the courts to award attorney fees to remedy unfair litigation tactics.[216] The Grices provide the following reasons:

> The Grices had an "established right" to damages to their property outside the 100-foot easement area and the construction easement. The statute says so explicitly. VELCO "forced" the Grices to hire an appraiser, and to expend attorneys fees in locating, working with and presenting that appraiser, in order to enjoy the benefit of the statutory right. Without this expenditure, the condemnation would have proceeded forward and res judicata would have precluded the Grices from raising the defect in any other proceeding.[217]

The Grices' arguments are not new, and were thoroughly addressed in the PFD by the Hearing Officer.[218] The Hearing Officer's PFD reviews Vermont case law on this issue and concludes that the award of attorney fees and expert witness costs are not justified. He indicated that there is no evidence of bad faith on the part of the other parties, nor evidence of willful prolonging of the litigation. He indicated that there is no statutory basis for granting the Grices' request. As to the equitable argument raised by the Grices, the Hearing Officer also recognized that the

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[216] *In re Appeal of Gadhue*, 149 Vt. 332 (1987).

[217] Grices' Exceptions at 53.

[218] *See* PFD at 52-57.

Grices have not been forced to be involved in any litigation other than this one in order to preserve their rights. He also addressed and rejected the Grices' contention that this case is, in fact, an inverse condemnation.

We concur in the Hearing Officer's analysis, and thus, we conclude that there is no basis upon which to award attorney fees or expert costs to the Grices.

VELCO's Comments

VELCO asks the Board to conclude that VELCO can install a 72-fiber Optical Ground Wire within the easement that is the subject of this proceeding.[219] VELCO would reserve twenty-four of the seventy-two fibers for protective relaying and communications relating to protecting the transmission line, and lease to third parties the balance of the fibers in the cable. With one exception, VELCO offers no new arguments beyond those that the Hearing Officer considered and rejected in his PFD.[220] VELCO submits *Peyser v. VELCO* as further support of its position that it

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[219] In addition to reaching a different conclusion than that recommended by the Hearing Officer, VELCO has also asked that we adopt the following VELCO findings: nos. 93-97 (justifying the need to trade fibers with other telephone companies); nos. 78-80 (transmission of intelligence); and nos. 82-83, 85-92, 95 (type of cable proposed and VELCO's current telcommunications system).

[220] This is discussed thoroughly by the Hearing Officer at pages 23-27 of the PFD.

should be allowed to install a 72-fiber Optical Ground Wire within the easement at issue here.[221] As explained below, we are unconvinced by VELCO's arguments, and thus uphold the Hearing Officer's decision on this issue.

The Peyser decision relies upon the conclusion that an "easement is defined by the burden it imposes on the servient estate rather than by the benefit it provides the user."[222] While all the facts of the *Peyser* case are not clear, including whether the easement at issue was acquired through condemnation or otherwise, in the present case the Board is bound by the dictates of 30 V.S.A. § 112 when considering what can and cannot be acquired by a public utility in a condemnation proceeding. Section 112 requires that "the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public."[223]

The Hearing Officer considered this issue during this investigation and, in plain language, made clear to VELCO that it is limited in its ability to rely upon condemnation authority for the purposes its seeks here. By Order dated June 23, 2006, he wrote:

> VELCO's authority in this context derives from the public purpose it exercises, i.e., its

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[221] *Peyser v. VELCO*, Docket No. S 70-92Ac, May 31, 1994.

[222] *Id.* citing 23 Am. Jur. 2d *Easements and Licenses* § 1 (1966).

[223] 30 V.S.A. § 112(2).

> role as an electric transmission company. Thus, to the degree that it needs to transmit intelligence over lines to render adequate transmission service to the public, VELCO has the authority to take property rights to the extent necessary for that purpose. By the same token, however, VELCO does not have the authority to condemn land to place communications cable for purposes other than those related directly to its transmission-system-related communications needs.[224]

In a further procedural Order dated July 31, 2006, in discussing the potential resolution of the question of VELCO's authority on this point, the Hearing Officer further stated that "the decision rule articulated is clear: VELCO's authority to condemn comes from the 'public purpose it exercises, *i.e.*, its role as an electric transmission company.'" This point was made clearly during the oral argument in the exchange between counsel for VELCO and Board Member Burke:

> Board Member Burke: Just answer me this then and we'll move on. For this project to go forward, even given your argument as to the necessity of communication, it's not necessary for you to have more than a 24 – a 24 line fiber, right?
>
> Ms. Hayden: I would argue it's necessary for an efficient operation of the VELCO grid which is part –

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[224] PFD at 24 citing Order of June 23, 2006, at 15-16.

> Board Member Burke: Let me take it back and ask my question again. For this project, this project, to go forward it's not necessary for VELCO to have any more than a 24 optic line feed, right?
>
> Ms. Hayden: 24 fiber optics would allow VELCO to conduct the relaying on the facilities that are directly attached to the 345 line for this project.
>
> Board Member Burke: For this project. Thank you.[225]

For these reasons, we decline to grant VELCO's request or to adopt its proposed findings.

VELCO next asks that the Board adopt VELCO's proposed easement language that would limit its damages to those contemplated within the proposed easement. In support of its position, VELCO argues that "the plain language of the proposed easement would assure that VELCO is not liable for inherently destructive activities that it is expressly authorized to carry out."[226]

The Hearing Officer concluded, on the basis of testimony of VELCO witness Lind, that since VELCO's petition seeks:

> "a few particular line construction and ongoing maintenance rights that are consistent with the grant under the current CVPS

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[225] Tr. 11/29/06 at 28-29 (Burke/Hayden).

[226] VELCO Comments at 9.

> easement," that VELCO cannot be seeking any rights that would be inconsistent with the grant under the current easement.[227] Since the "other than as contemplated" language is inconsistent, I conclude that it is not appropriate and that this limitation should be removed from the easement.[228]

We see no reason why VELCO should be granted additional limitations on its liability beyond those in the current easement, and thus agree with the Hearing Officer, and uphold his decision.

Motion to Vacate Stay

VELCO has submitted a "Motion to Vacate Statutory Stay." 30 V.S.A. § 124 provides for an automatic stay of a Board condemnation order when that order is appealed. The Grices filed a response to VELCO's motion in which the Grices make the following arguments.

The Grices assert that only the Supreme Court may vacate a statutory stay. This is correct. Section 124 provides that "a party who feels himself aggrieved . . . may appeal to the supreme court pursuant to the provisions of section 12 of this title."[229] Furthermore, section 112 provides that:

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[227] PFD at 22 (citations omitted).

[228] *Id.*

[229] 30 V.S.A. § 124.

> Such appeal shall suspend execution of the judgment of such board, but the supreme court, or a single justice in vacation, may vacate the suspension as justice and equity require.[230]

According to the Grices, because the statute allows for the entire Supreme Court or one of its Justices to "vacate the suspension," the Board is without the authority to do as VELCO has asked. Furthermore, for the Board to do so would result in the issuance of an advisory opinion.

We agree with the Grices. Recognizing VELCO's concern over possible delays pending the appeal of this case, we are addressing their request for a stay in today's order rather than in a subsequent order. This Board has the power conferred upon it by statute, and, in this case, the Legislature has not provided for the Board to be able to act upon a stay.[231]

We therefore, decline to grant VELCO's motion.

VII. ORDER

1. The Findings and recommendations of the Hearing Officer are adopted and affirmed by the Board.

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[230] *Id.*

[231] *See Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357 (1988).

2. The Petitioners, Vermont Electric Power Company, Inc., and Vermont Transco LLC, are entitled and authorized to condemn the easement that is the subject of these proceedings and described in the Findings, as modified by this Order.

3. Petitioners shall modify the easement deed (Exh. VELCO-TJC-6) to reflect the damages language in their current easement deed with the Grices (Exh. VELCO-TJC-5) in a manner consistent with this Order.

4. The total compensation to be paid for the easement on the Grices' property, to reflect the value of property taken, the impairment to the value of the remaining property, and consequential damages, based on its value as of September 23, 2005, is as follows: $25,000.

5. Full payment of compensation shall be made to Harley A. Grice, Trustee of the Harley A. Grice Revocable Trust, and Marilyn M. Grice, Trustee of the Marilyn M. Grice Revocable Trust, within thirty (30) days of the date of this Order.

6. Tender of payment of compensation shall precede the recording of a certified copy of these Findings and Order in the Town Clerk's Office of the Town of Middlebury, Vermont.

7. VELCO shall not be authorized by this easement to sell, lease, exchange or otherwise transfer any excess capacity in any data transmission

facilities it installs in the easement expansion which is authorized by this Order.

8. VELCO shall modify paragraph one of its easement deed as provided for in this Order.

Dated at Montpelier, Vermont, this 5th day of December, 2006.

)
_____) PUBLIC SERVICE
) BOARD
s/ David C. Coen) OF VERMONT
_____)
s/ John D. Burke)

OFFICE OF THE CLERK

FILED: December 5, 2006

ATTEST: s/Susan M. Hudson
Clerk of the Board

STATE OF VERMONT
Addison County, ss.:

SUPERIOR COURT
Docket No. 22-1-06 AnCV

HARLEY GRICE et al.

v.

VERMONT ELECTRIC POWER COMPANY

(Filed Jul. 7, 2006)

ENTRY

Plaintiffs seek declaratory relief challenging defendant, Vermont Electric Power Company's ("VELCO") authority to condemn their property for the installation of an electric transmission line. Before the court is defendant's motion to dismiss.

Background

A 115-kV electric transmission line operated and owned by VELCO currently traverses plaintiffs' property pursuant to an easement benefitting VELCO. As part of the Northwest Reliability Project, a project proposing to expand and upgrade electric transmission lines in northwestern Vermont, VELCO seeks to add a new 345-kV line adjacent to the existing 115kv transmission line. Plaintiffs' object to an expansion of VELCO's existing easement to accommodate the new transmission line.

VELCO has sought and acquired from the Public Service Board ("PSB") a Certificate of Public Good required to proceed with the Northwest Reliability

Project. The Vermont Supreme Court recently affirmed the PSB's grant of the Certificate. See *In re Petitions of Vermont Electric Power Company Inc.*, 2006 VT 21.

To expand their existing easements, VELCO can either obtain voluntary permission from individual landowners along the proposed route or alternatively initiate condemnation proceedings before the PSB against the landowners, if permission is not given. After negotiations, plaintiffs declined to voluntarily allow VELCO to expand its easement. As a result, VELCO, in September 2005, filed a condemnation petition with the PSB seeking to exercise the power of eminent domain over plaintiffs' property. Plaintiffs then commenced this action. With concurrent actions pending, one in front of the PSB and one here, VELCO now moves to dismiss.

VELCO argues that this court lacks jurisdiction and should defer to PSB for resolution of this matter, for four reasons. First, the filing of the condemnation petition with the PSB before the filing of this declaratory judgment action divests this court of jurisdiction. Second, plaintiffs have failed to exhaust administrative remedies, thus their claims are not ripe for adjudication. Third, no immediate, live controversy exists, making plaintiffs' claims unripe for adjudication. Fourth, as a matter of judicial economy the court should avoid piecemeal litigation and defer to the PSB at this time.

Plaintiffs counter, arguing that their action for declaratory relief should be heard by the Superior Court under the doctrine of primary jurisdiction because it involves pure questions of statutory and constitutional law thus does not require agency expertise. Moving beyond the jurisdictional issues raised by defendant, plaintiffs argue that VELCO cannot proceed with the condemnation petition because 1) federal law preempts VELCO's authority to condemn property 2) VELCO does not have authority under 30 V.S.A. § 112 or 30 V.S.A. § 2802 to exercise eminent domain and finally 3) VELCO's exercise of eminent domain powers violates Article 2 Chapter 1 of the Vermont Constitution.

Jurisdiction

We are persuaded that we maintain jurisdiction over plaintiffs' claims because they involve issues of statutory interpretation and constitutional law. Though we defer to administrative agencies in matters requiring agency expertise, here plaintiffs' statutory and constitutional claims are properly before this tribunal. *Gallipo v. City of Rutland,* 2005 VT 103, ¶ 44-45, 178 Vt. 244, 265. The PSB's role here is not to evaluate the constitutionality of a statute, nor to evaluate the extent and nature of its powers but rather to determine whether VELCO can condemn plaintiffs' property. We assume without deciding that we maintain jurisdiction to resolve plaintiffs' claims. We therefore address plaintiffs' substantive arguments in turn.

Federal Preemption

Plaintiff first argues that federal law preempts VELCO's ability to exercise eminent domain in this situation. More specifically, plaintiffs argue that the Federal Energy Regulatory Commission's ("FERC") regulation of VELCO's service to the public makes the current condemnation proceeding a matter of federal law. We disagree. As plaintiff concedes, this is a transmission line siting decision. VELCO has petitioned the PSB to condemn plaintiffs' property so that it may proceed with its project at a particular location. The condemnation of private lands over which public electric transmission lines will travel is not an area that the federal government has preempted. Though some legislators considered making transmission siting a task of the federal government, they have not yet done so. Cassandra B. Robertson. *Bringing the Camel into the Tent: State and Federal Power Over Electricity Transmission,* 49 Clev. St. L. Rev. 71, 92 (2001). The only siting authority granted to FERC is contained in a small provision in the 2005 Energy Policy Act that gives FERC backup siting authority in areas designated as "National Interest Electric Transmission Corridors." 16 U.S.C.S. § 824p. Neither parry contends this provision is applicable here.

Although FERC may regulate how the lines are used and how energy is distributed, siting of those lines is left to the States. In the system of regulating energy-related projects, the States perform certain functions and the Federal Government performs others. *Springfield v. McCarren*, 549 F.Supp. 1137,

1157 (D.Vt. 1982). Here, federal law does not preempt VELCO's ability to exercise the power of eminent domain for the purpose of actually building its electricity transmission corridors.

Plaintiffs' Statutory Claims

Plaintiffs next argue that VELCO's status a wholesale provider of electricity divests it of the ability to exercise eminent domain because VELCO does not provide electricity directly to individual consumers. Every entity that exercises the power of eminent domain has a corresponding obligation to use the condemned land in a way that serves the public. 30 V.S.A. § 112; 30 V.S.A. § 2802. Based on these statutes, plaintiffs argue that this obligation to the public requires that entities exercising eminent domain powers for land to site transmission lines must make electricity available *directly* to consumers on a retail basis. Put more succinctly, plaintiffs argue that VELCO's status as a wholesaler rather than a retailer of electricity prevents it from exercising eminent domain. The cases cited by plaintiffs do not make such distinction nor do they compel us to hold that an entity exercising eminent domain power must be the end seller and/or provider of that energy to consumers. In *Valcour v. Village of Morrisville,* 108 Vt. 242, 247-48 (1936) the Vermont Supreme Court concluded only that those entities deriving power from the waters of the State have a corresponding obligation to serve the public as a whole. The court did not require those entities to be energy retailers as

opposed to wholesalers, a distinction which may not even have existed at that time. VELCO's position within the hierarchy of electricity generation and distribution providers does not determine whether it has met its obligation to serve the public. In reality, the energy ultimately is transmitted to the homes and workplaces of the public, and therefore satisfies the public benefit requirement of 30 V.S.A. § 2802.

Also significant is the PSB's issuance of a Certificate of Public Good and the Vermont Supreme Court's subsequent approval of that decision. These decisions provide the necessary support for VELCO's power, as a provider of a public service, to exercise eminent domain. VELCO position as an exclusively wholesale provider of electricity does not thereby deprive it of the ability to exercise eminent domain power.

Finally, we note that plaintiffs' argument would seem to preclude condemnation for any electricity generation facility, of the lines which connect it to the Grid. Indeed, in the modern economy, do railroads qualify as serving the public, when passenger travel has disappeared and only large shippers are directly served?

Plaintiffs' Constitutional Claim

Plaintiffs' final argument is that the condemnation statute, 30 V.S.A. § 112, is unconstitutional because it allows entities, like VELCO, to condemn property for uses that will not directly serve all members of the public. The statute provides that the

PSB may allow VELCO to condemn property if it "is sought in order that the petitioner [VELCO] may render adequate service to the public" 30 V.S.A. § 112(3). The Vermont Constitution permits the condemnation of private property for public use when necessary. Vt. Const. ch I, art. 2. The PSB determination, affirmed by the Vermont Supreme Court that the Northwest Reliability Project qualifies for a Certificate of **Public** Good conclusively shows that the project qualifies as a **public** use of private property sufficient to trigger eminent domain powers under the Vermont Constitution. Contrary to plaintiffs' arguments, it is not necessary that the whole public, or any considerable portion thereof, participate in the use for it to be a "public use" needed for a valid exercise of eminent domain powers. *Deerfield River Co. v. Wilmington Power & Paper Co.*, 83 Vt. 548, 553 (1910). *Deerfield River* explicitly states that the transmission of electricity so qualifies as a public use sufficient to evoke eminent domain powers. Further, the Vermont Supreme Court held that the PSB is "not only eminently fit but unobjectionable on constitutional grounds that it should be entrusted with the determination of the questions of necessity and compensation in eminent domain proceedings brought by public service corporations." *George v. Consolidated Lighting Co.*, 87 Vt. 411, 419 (1914). We therefore find that the PSB's authority to grant VELCO condemnation powers under 30 V.S.A. § 112 is constitutional.

Accordingly defendant's motion to dismiss is GRANTED. Case dismissed.

Dated at Middlebury, Vermont, July 7, 2006.

/s/ Matthew I. Katz
Judge

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-510

JANUARY TERM, 2007

Harley Grice et al.	§	APPEALED FROM:
	§	
v.	§	Public Service Board
Vermont Electric Power	§	
Company et al.	§	DOCKET NO. PSB #7121

(Filed Jan. 9, 2007)

In the above-entitled cause, the Clerk will enter:

Velco has moved for a partial remand to the Public Service Board (PSB) for the limited purpose of clarifying the portion of the Board's December 5, 2006 order concerning Velco's installation of fiber-optic cable on the Grices' property. The motion is granted. The PSB shall issue an order clarifying its December 5, 2006 order within sixty days of this order.

The briefing schedules for this appeal and the companion appeal, 2006-352, are modified as follows: the appellant's brief and printed case in both appeals shall be due thirty days after the PSB issues its order on this partial remand.

FOR THE COURT:

/s/ Paul Reiber
Paul Reiber, Chief Justice

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7121

Amended Petition of Vermont Electric)
Power Company, Inc. for authority to)
condemn easement rights in property)
interests of The Harley A. Grice Revocable)
Trust, Harley A. Grice, Trustee; Wendy G.)
Butler, Penny E. Curler, Successor Trus-)
tees; and Harley A. Grice, Wendy G.)
Butler, Penney [sic] E. Curler and Heather)
H. Grice, as Beneficiaries; and the Marilyn)
M. Grice Revocable Trust, Wendy G.)
Butler, Penny E. Curler, and Harley A.)
Grice, Trustees; and Harley A. Grice,)
Wendy G. Butler, Penny E. Curler, and)
Heather H. Grice, as Beneficiaries, for the)
purpose of constructing the 345 kV trans-)
mission line portion of the so-called)
Northwest Reliability Project)

Order entered: 1/19/2007

ORDER RE: REQUEST FOR CLARIFICATION

I. Introduction

On January 9, 2007, the Vermont Supreme Court issued an Order (No. 2006-510) in which it granted a motion by Vermont Electric Power Company, Inc. ("VELCO") to remand this case to the Vermont Public Service Board ("Board") "for the limited purpose of clarifying the portion of the Board's December 5, 2006

order concerning Velco's installation of fiber-optic cable on the Grices' proprerty."[1] The Supreme Court directed the Board to "issue an order clarifying its December 5, 2006 order within 60 days."[2]

The Vermont Department of Public Service ("Department") filed a letter on January 9, 2007, in which it indicated that the "public interest and the parties' interests will be served if the Board takes immediate action upon the limited remand as time is of the essence in this matter."[3]

On January 10, 2007, the Board issued a memorandum to parties in this docket in which we directed VELCO to file its Motion to Clarify, and to "describe with specificity the clarification that it seeks, on or before Friday, January 12, 2007."[4] We also invited other parties to "file comments by that date," and set a deadline of January 18, 2007, for responsive filings.[5]

On January 12, 2007, VELCO filed a motion asking the Board to clarify that our December 5, 2006, Order "adjudges" that:

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[1] Vermont Supreme Court, No. 2006-510, January 9, 2007, at 1.

[2] *Id.*

[3] Letter of the Department, January 9, 2007.

[4] Memorandum from the Clerk of the Board, January 10, 2007.

[5] *Id.*

(1) VELCO is authorized to install 72-fiber Optical Ground Wire ("OPGW") within the easement that is subject of the Order;

(2) VELCO currently plans to reserve at least 24 of the 72 fibers for protective relaying and communications to protect the 345 kV transmission line; and

(3) while VELCO has proposed to exchange or lease the excess capacity in the OPGW to third parties, the Order prohibits VELCO from selling, leasing, exchanging or otherwise transferring excess capacity in any data transmission facilities it installs in the easement expansion.[6]

On January 18, 2007, the Harley A. Grice Revocable Trust and the Marilyn M. Grice Revocable Trust ("the Grices") filed comments in response to VELCO's motion.[7] The Grices present four arguments in opposition to VELCO's requested clarification:

(1) by arguing that the Board's Order contains "no express statement" that VELCO is prohibited from installing the 72-fiber cable, VELCO ignores the Board's findings and conclusions;

(2) VELCO misconstrues the prohibition in the "Ordering Clause;"

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[6] VELCO Motion to Clarify, January 12, 2007, at 1.

[7] Memorandum on Behalf of Harly Grice et al. in Response to VELCO Motion to Clarify, January 18, 2007.

(3) VELCO ignores its own admission to the Board; and

(4) additional authorities and arguments cited by VELCO do not support its position.[8]

The Department filed a letter on January 18, 2007, in which it reiterated its concern over timing, and also contended that the Board should limit its clarification to evidence on the record.

II. DISCUSSION

In order to provide further support for their respective positions, VELCO and the Grices submitted additional factual materials. In this clarification of our December 5, 2006, Order ("Order"), we rely only upon the record evidence in this case, and upon none of the additional factual materials submitted by VELCO and the Grices.

As explained below, with regard to VELCO's first request for clarification, we conclude that VELCO is not authorized to install 72-fiber OPGW within the easement that is subject of the Order. In our Order we concluded that section 112 of Title 30 authorizes the taking of property only in cases where such action is necessary for a utility company to render adequate service to the public in the conduct of its business.

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[8] *Id.* at 1-4.

Under § 112, the Board may authorize the condemnation of a "property or right only when the condemnation is necessary in order that the petitioner [here VELCO] may render adequate service to the public in the conduct of the business which it is authorized to conduct. . . ."[9] As we noted in our Order, this issue was addressed a number of times. First, we observed that, by Order dated June 23, 2006, the Hearing Officer wrote:

> VELCO's authority in this context derives from the public purpose it exercises, i.e., its role as an electric transmission company. Thus, to the degree that it needs to transmit intelligence over lines to render adequate transmission service to the public, VELCO has the authority to take property rights to the extent necessary for that purpose. By the same token, however, *VELCO does not have the authority to condemn land to place communications cable for purposes other than those related directly to its transmission-system-related communications needs.*[10]

Second, in our Order, we noted that in a further procedural Order dated July 31, 2006, in discussing the potential resolution of the question of VELCO's authority on this point, the Hearing Officer stated that:

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[9] 30 V.S.A. § 112.

[10] Order at 77 (emphasis added).

> the decision rule articulated is clear: VELCO's authority to condemn comes from the "public purpose it exercises, i.e., its role as an electric transmission company."[11]

Third, at page 27 of the Order, we acknowledged this statutory limitation and set it out explicitly in required language for the VELCO easement:

> VELCO shall not be authorized by this easement to sell, lease, exchange or otherwise transfer any excess capacity in any data transmission facilities it installs in the easement expansion which is authorized by this Order. VELCO shall modify paragraph one of its easement deed to comply with this requirement by inserting the following underlined language:
>
> > . . . facilities for the transmission and/or distribution of electricity and for the transmission and/or distribution of data, information, video and voice communications *as may be required for the operation of its electric transmission facilities* (any of which facilities may be erected at different times and at such voltages and capacities as the Grantee may from time to time determine). . . .[12]

To summarize, section 112 of Title 30 authorizes a company such as VELCO to condemn land only where

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[11] *Id.* at 78.

[12] Emphasis in the original.

such action is necessary for it to render adequate service to the public in the conduct of its business.

The record in this Docket reflects that VELCO needs 24 fibers for protective relaying and communications relating to protecting its transmission line.[13] There is no record evidence supporting the necessity for VELCO to condemn property rights for capacity in addition to that allowed by 24-fiber OPGW. This point was emphasized last November during oral argument in an exchange between counsel for VELCO and Board Member Burke:

> Board Member Burke: Just answer me this then and we'll move on. For this project to go forward, even given your argument as to the necessity of communication, it's not necessary for you to have more than a 24 – a 24 line fiber, right?
>
> Ms. Hayden: I would argue it's necessary for an efficient operation of the VELCO grid which is part –
>
> Board Member Burke: Let me take it back and ask my question again. For this project, this project, to go forward it's not necessary for VELCO to have any more than a 24 optic line feed, right?

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[13] *See* Finding 56 of the Order which reads, in part, "VELCO would reserve twenty-four of the seventy-two fibers for protective relaying and communications relating to protecting the transmission line."

> Ms. Hayden: 24 fiber optics would allow VELCO to conduct the relaying on the facilities that are directly attached to the 345 line for this project.
>
> Board Member Burke: For this project. Thank you.[14]

The law and the record, therefore, are clear. VELCO cannot condemn greater property rights than are necessary for VELCO to provide adequate service, and VELCO needs only the telecommunications capacity represented by 24 fibers.

Our Order discusses this issue thoroughly, and reviews and rejects VELCO's arguments that it should be allowed to install a 72-fiber OPGW within the easement at issue here.[15] At page 77 we adopted the Hearing Officer's conclusion "that it is not necessary for VELCO to condemn the Grices' property in order to install excess communications capacity."[16]

In its motion to clarify, VELCO has rephrased its request and seeks clarification as to whether it can install seventy-two fiber OPGW, even though it will only use 24 of those strands. The answer, however, remains the same, and we reach the same conclusion here as we did in our Order. 30 V.S.A. § 112 requires that "the condemnation of such property or right is

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[14] Order at 78, citing tr. 11/29/06 at 28-29 (Burke/Hayden).

[15] Order at 23-27, 77.

[16] Order at 25.

necessary in order that the petitioner may render adequate service to the public."[17] Because VELCO still seeks to condemn property rights beyond those which are necessary for it to render adequate service to the public in the conduct of its business, we, once again, reject VELCO's request. Thus, VELCO is not authorized to install 72-fiber OPGW within the easement that is subject of the Order.[18]

With regard to VELCO's other two requests for clarification, we reach the following conclusions. First, we note that VELCO's second and third requests for clarification appear to presume that VELCO's first request – a clarification that the Order allows for the placement of 72-strand OPGW – would be granted. Since we conclude that VELCO is not authorized to install 72-fiber OPGW within the easement that is subject of the Order, we conclude that the remaining clarifications are moot.

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[17] 30 V.S.A. § 112(2).

[18] We note that our Order discusses alternatives which VELCO might pursue in order to accomplish its goal of installing higher capacity OPGW across the Grices' land. *See* Order at 27. We noted, first, that VELCO could negotiate with the Grices for the use of their property, and, second, that "it would appear from the broadly-worded easement deed associated with the existing 115 kV right-of-way that VELCO may be able to install communications cable with excess capacity across its existing easement, avoiding altogether the issue of condemnation for this purpose." *Id.* Although not relied upon directly in our Findings, the record reflects that VELCO currently uses the telecommunications facilities installed across this existing easement for commercial purposes. *See* tr. 8/29/06 at 134 (Nelson).

VELCO is not authorized to install capacity beyond that which is necessary to VELCO's provision of adequate service. Therefore, there is no need for clarification of its second request: whether the Order concludes that VELCO currently plans to reserve at least 24 of the 72 fibers for protective relaying and communications to protect the 345 kV transmission line. We do not dispute that this was VELCO's plan; however because VELCO is not authorized to set a 72-fiber OPGW, this clarification is unnecessary because it has no bearing on the property rights that VELCO has been authorized to condemn under the Order.

Likewise, VELCO's third requested clarification is also moot. Since VELCO cannot condemn property rights in order to install excess telecommunications capacity, there is no need for a clarification as to a prohibition on VELCO's ability to sell, lease, exchange or otherwise transfer excess capacity in any data transmission facilities it installs in the easement expansion.[19]

So ORDERED.

Dated at Montpelier, Vermont, this 19th day of January, 2007.

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[19] We note that, to the degree that this request could be construed as clarification of regarding capacity that may become excess at some future time, this issue is not ripe for consideration.

	)	PUBLIC
	)	
SERVICE s/ David C. Coen	)	BOARD
s/ John D. Burke	)	OF VERMONT

OFFICE OF THE CLERK

FILED: January 19, 2007

ATTEST: /s Susan M. Hudson
Clerk of the Board

In the Supreme Court of Vermont

Harley Grice, et al.
Appellants

v.

Vermont Electric Power Co. et al.
Appellees

Superior Court Docket #22-01-06Ancv
Public Service Board Docket #7121
Supreme Court Docket #2006-510, #2006-352

APPELLANTS' REPLY BRIEF

May 4, 2007

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq., PC
PO Box 229, 15 Main St.
Bristol VT 05443
802 453-7011

* * *

[9] **iv. The 72-fiber cable will be [sic] occupy more space than a 24-fiber cable.**

As set forth in argument *C.i.* below, the size of the cable is irrelevant under Article 2 of the Vermont Constitution, the Fifth Amendment, and 30 V.S.A. § 112. However, the Grices wish to point out the additional size of the larger cable on the Grices' land. The additional fibers add about 1/16th of an inch to the cable's diameter. See letter of John Marshall, Esq., to PSB dated 1/5/07, p.4. The cable will be strung across approximately one mile on the Grice property. There is sag in the cable between poles, so 10% can be added to the length as a conservative

estimate. This means that the cable will span approximately 5,800 feet, or 69,600 inches. If the 72-fiber cable is 1/16 inch larger, it will have a visible area of approximately 4,350 square inches greater than the 24-fiber cable. This is equivalent to a billboard approximately 8 feet wide and 4 feet tall.

* * *

[13] **C. THE BOARD DID NOT ERR IN REJECTING VELCO'S REQUEST TO CONDEMN EXCESS CAPACITY FIBER OPTIC RIGHTS**

i. 'Material burden' analysis is inappropriate in determining if there is a taking, unless a prior easement is being construed; Article 2 and the Fifth Amendment required the Board to reject VELCO's claims.

VELCO's principal argument is that numerous courts have found small incremental material burden when a fiber optic line is added to pre-existing utility easement, and therefore there is no taking "as a matter of law." *Appellee's Brief* pp. 3-7. But these cases all address whether a fiber optic line is consistent with the original grant of rights to the holder of a preexisting easement. The cases all hold that the new burden must he evaluated by *comparing it* to the burdens and uses contemplated *by the original grant*. [14] The principal source cited by VELCO, *Presault v. City of Burlington* case. 2006 VT 63, 908 A.2d 419, makes this clear. See e.g., ¶ 12 ("the statutory right provided by §§ 2513-2514 and predecessor statutes is

in the nature of an easement in the sense that the right entitles utilities to use the railroad right-of-way in a manner that does not materially burden the landowner *beyond what was originally intended* by the conveyance or condemnation of the right-of-way.") (Emphasis added.)

At no time has VELCO ever offered to submit evidence, or submitted any evidence, of "what was originally intended." It can't. There is no preexisting easement that needs to be construed. This is a condemnation proceeding to take rights from the Grices in an area where there are no existing easements.

The Hearing Officer and Board explained that the issue is whether the State of Vermont can take away from a property owner control over his or her land and award that control to an electric transmission company. It is irrelevant (and illogical) to argue that VELCO's physical intrusion is so small that it is consistent with the intent of the original grant, *because there is no original grant.* The question is whether such a grant should now issue, and if so, on what terms. Section 112 alone answers that question.

The law relied upon by VELCO would control if this case involved an existing easement, and if the parties were disputing whether or not the existing easement authorized installation of excess capacity fiber optic cables for leasing to third parties. That is the issue addressed by some of the caselaw VELCO cites. In this case, although there is an existing easement, that existing easement is not the subject of

this case. VELCO seeks to condemn a new easement covering a different physical area adjacent to the old one.

[15] The Board's ruling understates the constitutional issues at stake. As the Grices argued at length, 11/29/06 tr. pp. 14-21, the "right to exclude" lies at the heart of the property rights protected by the Fifth Amendment and Article 2 of the Vermont Constitution. It is one of the most important property rights in the "bundle of rights" protected by our constitutions. A recent law review article explains:

> American courts and commentators have deemed the 'right to exclude' foremost among the property rights, with the Supreme Court characterizing it as the 'hallmark of a protected property interest.'

The fact that the owner has permitted one use – or has had that particular right taken by eminent domain – does not waive the owner's right to exclude other uses. L.J. Strahilevitz, *Information Asymmetries and the Right to Exclude*, 104 Mich.L.Rev 1835, 1836 (2006). See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164. 73 L.Ed. 2d 868 (1982), and *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, esp. p. 604-05 (11th Cir. 1992) (applying *Loretto* to an attempt to impose commercial cable use upon an existing utility easement).

Loretto involved 30 feet of ½-inch communications cable, suspended in the air about 18 inches

above a roof. The cable occupied a total space of 1/8th of a cubic foot on the plaintiffs property. 458 U.S. 422, 453. This a small fraction of the additional area occupied by the larger cable on the Grice lands. But even as to this small area, the Court ruled that the plaintiff's "power to exclude" had been taken, 458 U.S. 434-435, and that the constitutional violation constituted "perhaps the most serious form of invasion of an owner's property interests." 458 U.S. 435. The Court held that by this action, "the government does not simply take a single 'strand' form the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand." 458 U.S. 435. The opinion [16] also rejects the argument that the small size of the area affected means there is no taking: "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." 458 U.S. 436.

Instead of the size of the area occupied, it is the value of the right to exclude that lies at the heart of the constitutional issue. In many cases, as here, the right to exclude has economic value. *Information Asymmetries,* supra at 1843. If VELCO wants to use the Grices' property for revenue production, the Grices and VELCO can negotiate a fair price for that use. *Central Maine Power,* Docket No. 98-573, 1999 Me. PUC Lexis 441, slip op. at p. 18 (parties to easement agreement may negotiate a price for laying fiber optic cable that is based on the economic value of the fiber optic cable, "in addition to the burden on the land.").

As the Grices argued below, if the Board were to award excess capacity fiber optic rights to VELCO without first finding necessity, that would violate Article 2. If the Board were to award excess capacity fiber optic rights without awarding additional compensation for this additional taking, that would violate Article 2 and the Fifth Amendment. PC 338-340, 435-437; 11/29/06 tr. pp. 14-21. Under Article 2 and the Fifth Amendment, the right to exclude Adelphia, Comcast or Verizon from their farm is a right held by the Grices. If that right is to be taken from them, necessity must be shown and compensation must be awarded.

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[27] May 4, 2007

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